

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	CASE NO. 07CR00329-LAB
	)	
VS.	)	
	)	SAN DIEGO, CALIFORNIA
KYLE DUSTIN FOGGO, (1)	)	JULY 9, 2007
BRENT ROGER WILKES, (2)	)	2:00 P.M.
	)	
	)	
DEFENDANTS.	)	
	)	

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REPORTER'S TRANSCRIPT

MOTION HEARING  
STATUS CONFERENCE

APPEARANCES:

FOR THE GOVERNMENT:

KAREN P. HEWITT, U.S. ATTORNEY  
BY: PHILLIP L.B. HALPERN, ESQ.  
JASON A. FORGE, ESQ.  
VALERIE CHU, ESQ.  
ASSISTANT U.S. ATTORNEYS  
880 FRONT STREET  
SAN DIEGO, CA. 92101

FOR DEFENDANT FOGGO:  
(TELEPHONIC)

AKIN GUMP STRAUSS HAUSER & FELD  
BY: W. RANDOLPH TESLIK, ESQ.  
MARK MAC DOUGALL, ESQ.  
PAUL BUTLER, ESQ.  
1333 NEW HAMPSHIRE AVE., N.W.  
WASHINGTON, DC 20036-1564

FOR DEFENDANT WILKES:

GERAGOS & GERAGOS  
BY: MARK J. GERAGOS, ESQ.  
350 SOUTH GRAND AVENUE, 39TH FL.  
LOS ANGELES, CA. 90071

1 CONTINUED APPEARANCES:

2 FOR DEFENDANT MICHAEL:

LAW OFFICES OF RAYMOND GRANGER  
3 BY: RAYMOND R. GRANGER, ESQ.  
4 757 THIRD AVENUE, 7TH FLOOR  
NEW YORK, NY 10017

5  
6  
7  
8 COURT REPORTER:

EVA OEMICK  
OFFICIAL COURT REPORTER  
9 UNITED STATES COURTHOUSE  
10 940 FRONT STREET, STE. 2190  
SAN DIEGO, CA 92101  
11 TEL: (619) 615-3103  
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1        SAN DIEGO, CALIFORNIA - MONDAY, JULY 9, 2007 - 2:00 P.M.

2                THE CLERK:    CALLING NO. 17 ON THE CALENDAR,  
3        07CR00329, UNITED STATES OF AMERICA VERSUS KYLE DUSTIN FOGGO  
4        AND BRENT WILKES.

5                MR. GERAGOS:    GOOD AFTERNOON, YOUR HONOR.

6                MARK GERAGOS WITH MR. WILKES, WHO IS PRESENT.

7                THE COURT:    GOOD AFTERNOON.

8                MR. HALPERN:    PHIL HALPERN, JASON FORGE, AND VALERIE  
9        CHU FOR THE GOVERNMENT.

10              MR. MAC DOUGALL:    GOOD AFTERNOON, YOUR HONOR.

11              MARK MAC DOUGALL IN WASHINGTON WITH RANDY TESLIK AND  
12        PAUL BUTLER FOR DEFENDANT DUSTY FOGGO.    AND WE ARE GRATEFUL TO  
13        THE COURT FOR INDULGING US TO BE ABLE TO APPEAR BY TELEPHONE.

14              THE COURT:    MR. MAC DOUGALL, GOOD AFTERNOON TO YOU  
15        AND MR. FOGGO AND MR. TESLIK.

16              IF, AT ANY POINT, MR. MAC DOUGALL, YOU CAN'T HEAR  
17        WHAT'S BEING SAID IN COURT, SPEAK UP RIGHT AWAY.    I'M GOING TO  
18        HAVE EVERYBODY STAY CLOSE AND SPEAK INTO THE MICROPHONES.    BUT  
19        IF THAT HAPPENS, JUST INTERRUPT US.    OKAY?

20              MR. MAC DOUGALL:    THANK YOU.

21              THE COURT:    HOLD ON.    WE'VE GOT MR. GRANGER.    WE'RE  
22        GOING TO TRY TO GET HIM ON, TOO.

23              MR. GRANGER:    JUDGE, I'M ON.

24              THE COURT:    MR. GRANGER, DO YOU WANT TO STATE YOUR  
25        APPEARANCE?

1 MR. GRANGER: RAYMOND GRANGER, G-R-A-N-G-E-R,  
2 COUNSEL FOR JOHN MICHAEL IN U.S. VERSUS WILKES AND MICHAEL.

3 THANK YOU FOR GIVING ME THE OPPORTUNITY TO LISTEN IN  
4 TODAY.

5 THE COURT: SAME THING, MR. GRANGER. IF, AT ANY  
6 POINT, YOU CAN'T HEAR SOMETHING, JUST SPEAK UP AND WE'LL GO  
7 FROM THERE.

8 MR. WILKES, GOOD AFTERNOON.

9 MR. MAC DOUGALL, IS MR. FOGGO WITH YOU?

10 MR. MAC DOUGALL: NO, YOUR HONOR, HE'S NOT. MY  
11 PARTNERS, RANDY TESLIK AND PAUL BUTLER, ARE HERE.

12 THE COURT: YOU WAIVE HIS APPEARANCE FOR PURPOSES OF  
13 THIS HEARING?

14 MR. MAC DOUGALL: WE DO, YOUR HONOR.

15 THE COURT: MY UNDERSTANDING IS THERE ARE TWO  
16 MATTERS OF BUSINESS BEFORE THE COURT: THERE'S A RENEWED  
17 MOTION REGARDING THE INVESTIGATION INTO THE ALLEGED LEAK OF  
18 INFORMATION BEFORE THE GRAND JURY.

19 MR. GERAGOS: THAT'S CORRECT. I DON'T KNOW IF I'D  
20 CALL IT RENEWED. I GUESS IT'S AN ONGOING REQUEST FOR A STATUS  
21 CONFERENCE AS TO THAT. I HAVEN'T HEARD A THING, AND I THINK  
22 MR. MAC DOUGALL FILED IN HIS JOINDER THAT HE HASN'T BEEN  
23 CONTACTED.

24 THE COURT: HE DID.

25 THE OTHER MOTION THAT I'M AWARE OF IS A MOTION FOR

1 THE COURT TO RECONSIDER THE DECISION NOT TO COMPEL MR. GERAGOS  
2 TO GO THROUGH SOME KIND OF SECURITY CHECK.

3 LET ME DEAL FIRST WITH -- IS THAT RIGHT, THAT THOSE  
4 ARE THE TWO MATTERS IN FRONT OF ME TODAY?

5 MR. GERAGOS: THAT'S CORRECT.

6 THE COURT: MR. MAC DOUGALL, MR. GRANGER, YOU AGREE  
7 WITH THAT?

8 MR. GRANGER: YES.

9 MR. MAC DOUGALL: I DO.

10 THE COURT: LET ME DEAL FIRST WITH THE MATTER OF  
11 THE STATUS REGARDING THE GRAND JURY LEAK INVESTIGATION.

12 ON JUNE 14TH, THE COURT RECEIVED A LETTER FROM  
13 CAROLYN DELANEY, WHO IS THE EXECUTIVE ASSISTANT UNITED STATES  
14 ATTORNEY IN THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO.  
15 I'LL MAKE A COPY OF THIS LETTER AVAILABLE TO ALL PARTIES. BUT  
16 THE LETTER IS ADDRESSED TO ME. AND THE LETTER FOLLOWS A  
17 PERSONAL CONVERSATION I HAD WITH MS. DELANEY, WHO CALLED ME.  
18 AND I ASKED HER TO PLEASE PUT IN WRITING SO THAT I COULD GIVE  
19 IT TO COUNSEL THE GIST AND SUBSTANCE OF THE INFORMATION THAT I  
20 AM ABOUT TO READ TO YOU.

21 IT READS -- AGAIN, DATED JUNE 14TH, 2007. IT READS  
22 "RE: GRAND JURY LEAK INVESTIGATION IN RE: WILKES, ET AL. DEAR  
23 JUDGE BURNS: ON MAY 30TH, 2007, I WAS APPOINTED AS A SPECIAL  
24 ATTORNEY TO THE UNITED STATES ATTORNEY GENERAL PURSUANT TO  
25 28 USC SECTION 515 WITH REGARDS TO THE ABOVE-CAPTIONED MATTER.

1 AFTER CAREFUL CONSIDERATION, IT IS THE DECISION OF THE  
2 DEPARTMENT OF JUSTICE THAT NO FURTHER INVESTIGATION OF THIS  
3 MATTER IS WARRANTED. THIS DECISION WAS MADE AFTER AN ANALYSIS  
4 OF THE ALLEGED LEAK AND WITH THE CONCURRENCE OF THE OFFICE OF  
5 THE INSPECTOR GENERAL AND THE OFFICE OF PROFESSIONAL  
6 RESPONSIBILITY. PLEASE FEEL FREE TO CONTACT ME IF YOU HAVE  
7 REQUIRE ANY FURTHER INFORMATION. SINCERELY, CAROLYN DELANEY."

8 AS I SAID, I'LL MAKE A COPY OF THIS AVAILABLE TO ALL  
9 COUNSEL.

10 MR. GERAGOS: I DON'T KNOW WHAT KIND OF  
11 INVESTIGATION WAS DONE. NOBODY WAS CONTACTED. THAT'S ONE OF  
12 THE GREAT INVESTIGATIONS OF ALL TIME. YOU APPOINT A U.S.  
13 ATTORNEY WHO SAYS, "AFTER CONSIDERING THIS, WE'RE NOT GOING TO  
14 DO AN INVESTIGATION." AS I REMEMBER, THIS COURT, IN NO  
15 UNCERTAIN TERMS, SAID YOU'RE THE ONE WHO INSTRUCTS THE GRAND  
16 JURORS ABOUT SECRECY IN THIS DISTRICT.

17 IF THIS IS THE EXTENT OF THIS, I WOULD ONLY POINT  
18 THE COURT TO AN INVESTIGATION WHICH I'M INTIMATELY FAMILIAR  
19 WITH WHICH PRODUCED A CONVICTION IN THE NORTHERN DISTRICT  
20 WHERE THE CENTRAL DISTRICT WAS APPOINTED FOR GRAND JURY LEAKS.  
21 AND IT TURNED OUT THAT IT CAME OUT OF THE DEFENSE CAMP.

22 WELL, THEY CERTAINLY DIDN'T CLOSE IT WITHOUT CALLING  
23 ANYBODY. IF FACT, THEY DIDN'T REST UNTIL THEY THREATENED TO  
24 PUT REPORTERS IN PRISON. AND THEN WHEN THAT FAILED -- THAT  
25 HAVING FAILED, THEY ROLLED OVER A P.I. ONTO THE DEFENSE LAWYER

1 AND ENTERED INTO A PLEA AGREEMENT, WHICH I BELIEVE JUDGE WHITE  
2 WOULDN'T EVEN GO ALONG WITH BECAUSE HE FELT IT WAS SUCH AN  
3 EGREGIOUS VIOLATION.

4 I ONLY AGREED BECAUSE I WAS TOLD AT THE TIME --  
5 IT WAS REPRESENTED HERE IN COURT WHEN I WAS LAST STANDING HERE  
6 THAT THIS WAS GOING TO BE A LEGITIMATE INVESTIGATION. HOW ANY  
7 INVESTIGATION COULD TAKE PLACE WITHOUT CONTACTING EITHER ME OR  
8 MR. MAC DOUGALL TELLS YOU WHAT THE SCOPE OF IT WAS.

9 I KNOW -- I BELIEVE THE COURT WAS LOOKING AT ME AND  
10 SAYING IN SEPTEMBER YOU PLANNED ON THIS CASE GOING TO TRIAL.  
11 HOW THIS CASE IS GOING TO GO TO TRIAL WITHOUT THIS  
12 INVESTIGATION BEING DONE IN SOME KIND OF A REASONABLE FASHION  
13 IS BEYOND ME. BUT I WOULD NOW REQUEST THAT THE COURT ALLOW US  
14 TO HAVE A HEARING. AND I WOULD LIKE TO -- IN CONJUNCTION  
15 WITH, I ASSUME, MY CO-COUNSEL, I'D LIKE TO SUBPOENA THE  
16 REPORTERS IN. IT'S ALREADY BEEN RULED. WE'VE GOT 9TH CIRCUIT  
17 LAW THAT THEY'VE GOT NO SOURCE PROTECTION. LET ME PUT THEM  
18 UNDER OATH. LET'S REMAND THEM INTO CUSTODY IF THEY'RE GOING  
19 TO ALLEGE SOME KIND OF SOURCE PROTECTION. LET'S THEN PUT THE  
20 U.S. ATTORNEYS UNDER OATH AND THE AGENTS UNDER OATH. LET'S DO  
21 A LEGITIMATE INVESTIGATION.

22 WHAT THEY'RE BASICALLY TELLING YOU IS TO GO POUND  
23 SAND. AND I DON'T BELIEVE THAT GIVEN WHAT HAPPENED IN THIS  
24 CASE, THAT THAT'S APPROPRIATE IN THE LEAST. THIS COURT SAID,  
25 IN DENYING THE MOTION TO DISMISS, THAT IT WAS -- AND I ONLY

1 AGREED BECAUSE I BELIEVED AT THE TIME THERE WAS GOING TO BE A  
2 LEGITIMATE INVESTIGATION. THERE CLEARLY HAS NOT BEEN ANY  
3 INVESTIGATION. NOTHING'S BEEN DONE.

4 AND I DON'T UNDERSTAND HOW WE'RE SUPPOSED TO GO TO  
5 TRIAL IN 60 DAYS NOT HAVING GOTTEN TO THE BOTTOM OF THIS WHEN  
6 I BELIEVE THE COURT AND I AGREED WHEN WE TALKED ABOUT THIS  
7 LAST TIME THAT CLEARLY THIS WOULD GO BRADY IF NOT GIGLIO  
8 MATERIAL, THAT IT'S IMPEACHMENT.

9 AND CLEARLY, IF IT EMANATED FROM THE U.S. ATTORNEY'S  
10 OFFICE HERE IN THIS DISTRICT, THE COURT HAS INDICATED THAT MAY  
11 BE THE GROUNDS FOR A DISMISSAL IN TERMS OF -- I THINK YOU HAD  
12 SAID ALMOST SARCASTICALLY "YOU CAN HANDICAP THIS UNLESS IT  
13 CAME FROM YOU OR ONE OF YOUR COLLEAGUES," AND I SAID, "OR  
14 MS. LAM," THAT THIS WAS SOMETHING OF GREAT -- IMPORTANT GREAT  
15 SERIOUSNESS.

16 I THINK THAT LETTER IS WORTH PROBABLY LESS THAN THE  
17 STAMP IT WAS MAILED ON IN TERMS OF WHAT THIS INVESTIGATION  
18 WAS. THERE WAS NO INVESTIGATION WHATSOEVER. THEY'RE THUMBING  
19 THEIR NOSE AT THE COURT AND COUNSEL.

20 THE COURT: YOU WERE NEVER INTERVIEWED, I TAKE IT,  
21 MR. GERAGOS, BY MS. DELANEY?

22 MR. GERAGOS: I WASN'T EVEN CONTACTED. THAT'S WHY I  
23 FILED THE MOTION THAT I WANTED A STATUS CONFERENCE BECAUSE I  
24 DID NOT WANT TO BE HERE COME AUGUST WITH YOU TELLING ME --  
25 SAYING, "JUDGE, I'VE GOT TRIAL IN A MONTH, AND I HAVEN'T HEARD



1 A THING." I WANTED TO HEAR IT. I WANTED TO KNOW WHAT IT WAS.  
2 I HAVEN'T HEARD A THING. MR. MAC DOUGALL FILED, I BELIEVE  
3 UNDER PENALTY OF PERJURY, A DECLARATION SAYING THE SAME THING.  
4 WE HAVEN'T HEARD ONE THING, NOT ONE IOTA.

5 THE COURT: MR. MAC DOUGALL, DO YOU HAVE A POSITION  
6 ON THIS?

7 MR. MAC DOUGALL: I JOIN IN EVERYTHING THAT  
8 MR. GERAGOS JUST SAID. AS THE COURT HEARD -- AND I DON'T HAVE  
9 THE DATES IN FRONT OF ME. MR. FORGE, I BELIEVE, WAS VERY  
10 VOCAL ABOUT HIS UPSET AND DISCUSSED THE FACT THAT REPORTERS  
11 QUITE APPARENTLY HAD COPIES OF A DRAFT INDICTMENT PRIOR TO ITS  
12 PRESENTATION TO THE GRAND JURY. I HAVE NOT BEEN CONTACTED.  
13 AND AS THE COURT IS AWARE, ON THE RECORD I OFFERED TO  
14 COOPERATE IN ANY WAY I CAN WITH THAT INVESTIGATION.

15 I KNOW WHAT I KNOW, AND I KNOW WHAT I HAVE TO TELL  
16 WHOEVER INVESTIGATES IT. LIKE MR. GERAGOS, I DON'T THINK WE  
17 CAN UNDERSTAND HOW MS. DELANEY COULD REACH THAT CONCLUSION  
18 WITHOUT AT LEAST ASKING THE QUESTIONS OF THE PEOPLE WHO HAVE  
19 INFORMATION.

20 THE COURT: ANYONE ELSE? MR. GRANGER, DO YOU HAVE  
21 ANY POINT OF VIEW ON THIS?

22 MR. GRANGER: IF I MAY, YOUR HONOR, YES.

23 I HAD PLANNED ONCE -- WHOEVER THE INVESTIGATOR WAS,  
24 WHOEVER THAT PERSON WAS WHO THEN GOT IN CONTACT WITH  
25 MR. GERAGOS AND MR. MAC DOUGALL, AT THAT POINT I WAS GOING TO

1 WRITE TO THAT PERSON AND TO ADVISE THIS INDIVIDUAL THAT WE  
2 ALSO HAVE SOME INFORMATION RELEVANT TO THAT INVESTIGATION.  
3 AND LIKE MR. MAC DOUGALL AND MR. GERAGOS, I WAS LEFT WITH THE  
4 IMPRESSION THAT THE GOVERNMENT HAD PLEDGED THERE WOULD BE A  
5 THOROUGH INVESTIGATION. IT BOGGLES THE MIND THAT AN  
6 INVESTIGATION COULD BE CLOSED BEFORE ANYONE WAS CONTACTED.

7 THE COURT: MR. FORGE AND MR. HALPERN, YOU WANT TO  
8 RESPOND?

9 MR. FORGE: AS WE INFORMED THE COURT SOME TIME AGO,  
10 OUR OFFICE HAS BEEN RECUSED FROM THIS MATTER, HOWEVER WE'RE  
11 GOING TO CHARACTERIZE IT, FOR QUITE SOME TIME NOW. SO NEITHER  
12 MR. HALPERN NOR MYSELF NOR MS. CHU HAVE ANY INFORMATION TO  
13 ADD. AND FRANKLY, WE'RE NOT IN A POSITION WHERE WE'RE EVEN  
14 ENTITLED TO KNOW.

15 THE LETTER YOU READ RIGHT NOW IN COURT IS  
16 INFORMATION WE'RE RECEIVING AT THE SAME TIME AS DEFENSE  
17 COUNSEL IS RECEIVING IT. AND I THINK THAT'S THE ONLY  
18 APPROPRIATE WAY FOR US TO BE ADVISED OF INFORMATION IN THIS  
19 CASE AS DEFENSE COUNSEL IS RECEIVING IT BECAUSE WE ARE RECUSED  
20 FROM THE MATTER. THERE IS NOTHING WE CAN ADD TO THIS  
21 DISCUSSION.

22 I WILL SAY IN TERMS OF THE TRIAL DATE, ONE HAS  
23 ABSOLUTELY NOTHING TO DO WITH THE OTHER. BECAUSE AS YOUR  
24 HONOR IS AWARE, THERE'S A LEGION OF CASES HOLDING THAT THE  
25 GOVERNMENT IS UNDER NO OBLIGATION TO INVESTIGATE IN ORDER TO

1 DISCOVER OR CREATE BRADY OR GIGLIO INFORMATION. SO THEY'RE  
2 TWO VERY SEPARATE ISSUES.

3 WE'RE RECUSED FROM THE FIRST, WHICH IS THE INQUIRY  
4 INTO THE ALLEGED RULE 6(E) VIOLATIONS. WE ARE VERY INTIMATELY  
5 INVOLVED WITH THE SECOND, WHICH IS THE TRIAL DATE. AND I  
6 DON'T THINK THE TWO HAVE ANYTHING TO DO WITH EACH OTHER.

7 THE COURT: IT'S A LITTLE MORE SPECIFIC THAN THAT,  
8 THOUGH, MR. FORGE. BECAUSE HERE YOU'VE ACKNOWLEDGED THAT  
9 THERE WAS A GRAND JURY LEAK. AND I THINK THE LAST TIME WE  
10 WERE HERE, YOU ACKNOWLEDGED THAT IF THAT LEAK CAME FROM  
11 SOMEONE WHO'S GOING TO BE A WITNESS IN THE CASE, THAT THAT  
12 FACT OUGHT TO BE KNOWN BY THE DEFENSE COUNSEL BECAUSE IT MIGHT  
13 GO TO BIAS OR MOTIVATION TO TESTIFY A PARTICULAR WAY, INTEREST  
14 IN THE OUTCOME OF THE CASE. IT'S SOMETHING, IN SHORT, THEY  
15 COULD USE TO ATTEMPT TO IMPEACH THE WITNESS IF THE WITNESS  
16 VIOLATED A LAW, A CONVENTION OF THE COURT, MAYBE YOUR  
17 INSTRUCTIONS IN LEAKING THIS, ASSUMING THAT HAPPENED.

18 I KNOW THAT THAT PRESUMES THAT THE PERSON IS GOING  
19 TO BE A WITNESS. BUT IT'S MORE SPECIFIC THAN WHAT YOU POSIT,  
20 OF HAVING TO GO OUT AND TRY TO COME UP WITH EXCULPATORY  
21 MATERIAL GIVEN THAT YOU ACKNOWLEDGE THAT SOMEBODY TIPPED OFF  
22 NEWSPAPERS IN ADVANCE THAT THERE WERE IMMINENT INDICTMENTS AND  
23 SOME -- I KNOW IT'S DISPUTED, BUT SOME DETAILS ABOUT WHAT THE  
24 INDICTMENT WOULD CONTAIN.

25 MR. FORGE: AND I JUST WANT TO MAKE CLEAR THAT AS

1 FAR AS THOSE DETAILS GO, THAT'S AN ALLEGATION THAT'S BEEN  
2 CARRIED AND SUPPORTED ONLY BY MR. GERAGOS'S DECLARATION, WHICH  
3 IS UNSUPPORTED BY REFERENCE TO THE SPECIFIC SOURCES. AND THAT  
4 WAS ACTUALLY A POINT OF THE GOVERNMENT'S PAPERS A COUPLE OF  
5 MONTHS AGO THAT THE UNSUBSTANTIATED ALLEGATIONS REALLY DON'T  
6 CARRY A WHOLE LOT OF WEIGHT.

7 IT IS A LITTLE BIT, I THINK, CONTRADICTORY TO BE  
8 ARGUING ON THE ONE HAND "HEY, WE NEED A FULL-BLOWN  
9 INVESTIGATION," BUT, ON THE OTHER HAND, FILING A DECLARATION  
10 BASED ON DOUBLE-HEARSAY AND NOT IDENTIFYING THE SOURCES. BUT  
11 THAT'S FOR MR. GERAGOS TO DECIDE, AND THAT'S FOR YOUR HONOR  
12 AND WHATEVER ENTITY INQUIRES INTO THIS MATTER TO DECIDE.

13 THE COURT: DID YOU INFORM THE PEOPLE AT THE  
14 DEPARTMENT OF JUSTICE THAT YOU REPRESENTED TO THE COURT IN THE  
15 FACE OF THE MOTION TO DISMISS THAT AN INVESTIGATION WAS  
16 UNDERWAY?

17 MR. FORGE: YOUR HONOR, I PROVIDED THEM WITH A  
18 COMPLETE TRANSCRIPT OF THE HEARINGS, INCLUDING THE EXCERPTS,  
19 AND SPECIFICALLY THE PORTION OF THE HEARING IN WHICH YOUR  
20 HONOR MADE CLEAR THAT -- AT THE LAST APPEARANCE, YOU MIGHT  
21 RECALL THAT I SAID, "LOOK, I WANT TO MAKE SURE WE'RE NOT  
22 GETTING CAUGHT UP IN SEMANTICS HERE. THE MATTER HAS BEEN  
23 ASSIGNED OUT. WHETHER THEY CONSIDER IT A, QUOTE/UNQUOTE,  
24 'INVESTIGATION' OR 'INQUIRY' IS UP FOR THEM TO DECIDE."

25 YOU WERE VERY SPECIFIC IN YOUR RESPONSE. YOU SAID,

1 "I WANT YOU TO MAKE IT CLEAR TO THEM THAT YOU WANT THIS TO BE  
2 INVESTIGATED OR YOU WILL BE VERY DISAPPOINTED," OR WORDS TO  
3 THAT EFFECT, "IF IT'S NOT BEEN INVESTIGATED." THAT SPECIFIC  
4 LANGUAGE WAS PROVIDED TO THEM. AND AGAIN, YOUR HONOR, SINCE  
5 WE'RE RECUSED, ALL WE CAN DO IS PASS ON INFORMATION THAT  
6 OCCURRED. I DIDN'T KNOW THAT LETTER HAD BEEN RECEIVED BY YOUR  
7 HONOR.

8 THE COURT: SOMEBODY'S PUT YOU IN A BIND BECAUSE  
9 WHEN YOU'RE IN A POSITION TO RESPOND TO THIS MOTION TO DISMISS  
10 AND ONE OF THE RESPONSES IS "WELL, THIS IS BEING LOOKED AT.  
11 THIS IS BEING LOOKED AT BY" --

12 WHAT DO THEY CALL OPR THESE DAYS?

13 MR. FORGE: THE OFFICE OF PROFESSIONAL  
14 RESPONSIBILITY. THE OFFICE OF THE INSPECTOR GENERAL IS ALSO  
15 INVOLVED.

16 THE COURT: UNDER ORDINARY CIRCUMSTANCES, I THINK  
17 THE SENSIBLE THING FOR A COURT TO DO IS TO SAY, "LOOK, THIS IS  
18 BEING LOOKED AT BY A PUBLIC INTEGRITY SECTION OF THE  
19 DEPARTMENT, AND I HAVE NO REASON TO QUESTION WHETHER A  
20 THOROUGH INVESTIGATION WILL BE MADE. I'M NOT GOING TO GET  
21 SIDETRACKED WHEN WE HAVE A CASE TO TRY ON A SUBSIDIARY ISSUE  
22 OF A GRAND JURY LEAK PROVIDED IT'S UNDER INVESTIGATION."

23 BUT THE CIRCUMSTANCES HAVE CHANGED DRAMATICALLY WITH  
24 THIS LETTER. I'M SURPRISED THAT THEY COULD CONCLUDE WITHOUT  
25 TALKING TO EITHER MR. MAC DOUGALL OR MR. GERAGOS, WHO, AFTER

1 ALL, ARE PEOPLE THAT HAVE A HISTORICAL CONNECTION TO THIS NOT  
2 JUST IN THE FACT THAT THEY REPRESENT PEOPLE CHARGED, BUT THEY  
3 GOT CALLS. THEY HAD THE CALLS WITH PEOPLE WHO APPARENTLY HAD  
4 VERY SPECIFIC INFORMATION AND QUESTIONING THEM ABOUT THAT.

5 HOW IN THE WORLD COULD THE DEPARTMENT OF JUSTICE  
6 CONCLUDE AN INVESTIGATION WITHOUT TALKING TO PERCIPIENT  
7 WITNESSES?

8 MR. FORGE: AGAIN, THIS IS NOTHING THAT I HAVE  
9 KNOWLEDGE OF. I CAN'T COMMENT ON IT.

10 THE COURT: YES, BUT THEY'VE REALLY LEFT YOU IN A  
11 BIND HERE, MR. FORGE. BECAUSE, AS I SAID, THAT WAS THE REASON  
12 THAT I SAID, "OKAY. I'M NOT GOING TO GO ANY FURTHER WITH  
13 THIS. I'M GOING TO LET THIS PROCEED ON A SEPARATE TRACK  
14 BECAUSE I'M ASSURED THAT IT'S BEING INVESTIGATED."

15 YOU KNOW, I HAD SOME -- AS A FORMER ASSISTANT UNITED  
16 STATES ATTORNEY, I KNEW ABOUT OPR. I WAS FAMILIAR WITH THEM  
17 AND BELIEVED THAT CONSCIENTIOUSLY -- AND I GUESS I STILL DO --  
18 THAT CONSCIENTIOUSLY THEY'LL LOOK AT ACCUSATIONS OF WRONGDOING  
19 AND THOROUGHLY INVESTIGATE THEM AND NOT JUST GIVE SHORT SHRIFT  
20 TO THESE THINGS, PARTICULARLY WHEN THEY'RE BACKED UP BY  
21 DECLARATIONS OF COUNSEL WHO SAY, "WE HAVE FIRSTHAND KNOWLEDGE  
22 THAT SOMETHING WENT AWRY HERE BECAUSE SOMEBODY CALLED US  
23 BEFORE THE INDICTMENTS CAME DOWN AND WERE TALKING ABOUT VERY  
24 SPECIFIC INFORMATION THAT, GUESS WHAT, LATER CAME DOWN IN AN  
25 INDICTMENT." THAT'S PRETTY SERIOUS STUFF.

1 MR. FORGE: ALL THOSE ALLEGATIONS HAVE BEEN PASSED  
2 ON TO THE OFFICE OF GENERAL COUNSEL. BUT I WILL SAY, JUST TO  
3 GO BACK TO YOUR POINT, YOUR HONOR, ABOUT THE MOTION TO DISMISS  
4 THE INDICTMENT, NONE OF THESE ISSUES GO TO THE HEART OF THAT  
5 MOTION, WHICH IS WHETHER THERE WAS MEANINGFUL PREJUDICE TO THE  
6 DEFENDANTS.

7 THE COURT: I UNDERSTAND. I REMEMBER THE ARGUMENTS  
8 THAT YOU MADE. I THINK THERE IS A DISTINCTION.

9 MR. GERAGOS, I'M NOT SURE I WENT AS FAR AS YOU SAID  
10 WHERE YOU HAD ME ALMOST INDICATING I WAS READY TO DISMISS EVEN  
11 IF THIS WAS TRUE. WHAT I WAS READY TO DO WAS TO GIVE YOU FULL  
12 INFORMATION AS TO WHO MIGHT HAVE LEAKED THIS IN THE EVENT THAT  
13 THEY'RE A WITNESS. BECAUSE I THINK IT'S PROBATIVE EVIDENCE OF  
14 THAT WITNESS'S BIAS OR MOTIVATION TO TESTIFY IN A PARTICULAR  
15 WAY. YOU'RE FAMILIAR WITH THE STANDARD INSTRUCTION I GIVE TO  
16 JURIES. "ASK YOURSELF IN JUDGING CREDIBILITY WHETHER SOMEBODY  
17 HAS AN INTEREST IN THE OUTCOME OR SOME APPARENT BIAS OR  
18 PREJUDICE."

19 IF THAT'S TRUE OF A WITNESS THAT THEY CALLED HERE,  
20 THAT THE PERSON LEAKED INFORMATION KNOWING WHAT THE RULES  
21 WERE, I CAN'T IMAGINE THAT I WOULDN'T LET YOU IMPEACH THEM  
22 WITH THAT. AND I CERTAINLY KNOW THIS. THIS IS BEYOND ANY  
23 QUESTION. HE'S ENTITLED TO HAVE THE INFORMATION TO HE CAN  
24 ARGUE TO ME AND MR. MAC DOUGALL CAN ARGUE TO ME THAT IT'S  
25 PROPER IMPEACHMENT. I THINK IT PROBABLY IS.

1 BUT WHERE DO WE GO WHEN IT'S NOT EVEN BEING LOOKED  
2 INTO? THERE'S NO ATTEMPT TO FIND OUT WHO THE LEAKER WAS AND  
3 WHETHER THE LEAKER IS SOMEBODY THAT MAYBE YOU'RE GOING TO CALL  
4 AS A WITNESS.

5 MR. GERAGOS: I WAS GOING TO SUGGEST THAT YOU ALLOW  
6 US TO HAVE A HEARING. ALLOW ME TO SUBPOENA IN THIS WAY AND  
7 THE U.S. ATTORNEY -- THEY CAN HAVE MS. DELANEY COME DOWN HERE  
8 SINCE SHE DOESN'T HAVE ANYTHING BETTER TO DO SINCE SHE  
9 APPARENTLY CAN'T INVESTIGATE ANYTHING. LET HER COME SIT AT  
10 COUNSEL TABLE, AND SHE CAN HELP DEFEND THE PROSECUTION. I  
11 WANT TO HAVE A HEARING WHERE I HAVE A MEANINGFUL ABILITY TO  
12 BUT THE REPORTERS ON AND PUT THE OTHERS ON. I'VE GOT A  
13 TEMPLATE, WHICH IS WHAT THE CENTRAL DISTRICT DID.

14 THE COURT: LET ME KEEP THIS IN SOME SEMBLANCE OF  
15 CONTEXT THAT MAKES SOME SENSE TO ME IN LIGHT OF MY EXPERIENCE  
16 IN THE REASONABLE INFERENCES I WOULD DRAW.

17 I READ THE DECLARATION. I DON'T SEE A SCINTILLA OF  
18 EVIDENCE -- THERE'S AN INFERENCE, BUT I DON'T SEE A SCINTILLA  
19 OF EVIDENCE THAT MS. LAM IS THE PERSON WHO LEAKED THIS. AND I  
20 DON'T BELIEVE THAT FOR A SECOND HERE.

21 I THINK THE MORE LIKELY EXPLANATION IS IT'S SOMEBODY  
22 ON THE PERIPHERY OF THIS THAT HAD SOME DETAILS. I THINK  
23 THAT'S PROBABLY WHAT HAPPENED. THAT'S WHAT MY EXPERIENCE AND  
24 COMMON SENSE TELLS ME.

25 I KNEW MS. LAM FOR YEARS. BUT PUTTING ASIDE BY OWN



1 PERSONAL KNOWLEDGE AND RESPECT FOR HER INTEGRITY, JUST THE  
2 IDEA THAT THAT WOULD SOMEHOW HELP HER SITUATION, I -- THE GIST  
3 WAS IT WAS LEVERAGE TO KEEP HER JOB. AND I DON'T --

4 MR. GERAGOS: I WOULD HAVE SAID THE SAME THING PRIOR  
5 TO THE LAST THREE MONTHS OF TESTIMONY THAT I'VE HEARD UP ON  
6 CAPITOL HILL. I DON'T THINK THAT THERE'S ANYTHING THAT YOU  
7 CAN SAY -- NOT YOU, BUT THAT ONE CAN SAY THAT WOULD SURPRISE  
8 ME COMING OUT OF THIS DEPARTMENT OF JUSTICE AT THIS POINT, AND  
9 THERE'S NOTHING THAT WOULD SURPRISE ME COMING OUT OF THIS  
10 ADMINISTRATION AT THIS POINT.

11 THE COURT: MR. GERAGOS, THE SPECIFIC ALLEGATION YOU  
12 MADE OR THE INFERENCE YOU'VE ASKED ME TO DRAW IS THAT MS. LAM  
13 HERSELF LEAKED THE INFORMATION.

14 MR. GERAGOS: SOMEBODY HAD THE ENTIRE INDICTMENT AND  
15 READ THAT ENTIRE INDICTMENT AND REPRESENTED THAT THEY LOOKED  
16 AT THE ENTIRE INDICTMENT AND HAD SPECIFICS. AND THEY CAN KEEP  
17 SAYING THAT I'M INFERRING IT IN MY DECLARATION. I WROTE THEM  
18 A LETTER BEFORE THE INDICTMENTS CAME DOWN IN DETAIL.

19 THE COURT: IT'S NOT A QUESTION OF YOU INFERRING  
20 THAT SOMEBODY CALLED YOU WITH SPECIFIC INFORMATION. I ACCEPT  
21 AND I THINK THE GOVERNMENT ACCEPTS THAT THAT'S TRUE.

22 THE QUESTION IS WHO'S LIKELY TO BE RESPONSIBLE FOR  
23 THAT? WHAT'S THE MOST REASONABLE THING? NOW, I DON'T THINK  
24 IT'S REASONABLE, JUST ON THE FACE OF IT, THAT I WOULD IMPUTE  
25 THAT TO MS. LAM. I THINK YOU KNOW AND MR. MAC DOUGALL MAY

1 KNOW THE WAY THAT CHARGES ARE DECIDED AT SUCH POINT THAT THE  
2 GOVERNMENT DECIDES TO PRESENT A MATTER TO A GRAND JURY. THEY  
3 USUALLY CONVENE A GROUP OF SENIOR PROSECUTORS. OFTENTIMES,  
4 AGENTS ARE PART OF THAT GROUP. AND THEY HAVE WHAT THEY CALL  
5 AN INDICTMENT REVIEW MEETING. THEY DISCUSS THE EVIDENCE.  
6 THEY DISCUSS WHAT CHARGES ARE APPROPRIATE. TO MY KNOWLEDGE  
7 AND EXPERIENCE, EVERYBODY AT THAT MEETING HAS A COPY OF THE  
8 PROPOSED CHARGES.

9 SO I DON'T KNOW HOW BIG THE GROUP WAS IN THIS CASE.  
10 I DON'T KNOW WHO HAD ACCESS TO THE DRAFT OF THE INDICTMENT  
11 BEFORE IT WAS PRESENTED TO THE GRAND JURY. I TAKE YOUR POINT  
12 MS. LAM WAS PROBABLY IN THAT MEETING. I DON'T KNOW THAT FOR  
13 SURE. I'M ASSUMING ON A BIG CASE, THAT MS. LAM WOULD BE  
14 CONSULTED AND PERSONALLY PARTICIPATE. BUT AGAIN, I DON'T FOR  
15 A SECOND THINK THAT IT'S A REASONABLE INFERENCE THAT IT WAS  
16 CAROL LAM THAT LEAKED IT IN ORDER TO TRY TO SAVE HER JOB.

17 MR. GERAGOS: I UNDERSTAND, BUT WHY AM I HAVING TO  
18 DANCE AROUND IN THE SHADOWS? THIS COURT MADE IT EXPRESSLY  
19 CLEAR, EXPRESSLY CLEAR, THAT YOU WANT TO GET TO THE BOTTOM OF  
20 IT.

21 THE COURT: I DO.

22 MR. GERAGOS: YOU DID SAY, AND I DON'T THINK I'M  
23 MISQUOTING YOU -- I THINK YOU SAID TO THEM -- YOU CAN HANDICAP  
24 THIS -- "UNLESS IT CAME FROM DIRECTLY IN THE OFFICE, I'M NOT  
25 GOING TO GO DOWN THE DISMISSAL ROAD." AND THEN SOMETHING TO

1 THE EFFECT ABOUT THAT WE WERE ENTITLED TO IT AS IMPEACHMENT  
2 MATERIAL.

3 ALL I'M SAYING IS I DON'T TRUST AT THIS POINT  
4 ANYTHING THAT COMES OUT OF THE DEPARTMENT OF JUSTICE. CALL ME  
5 PARANOID, BUT I DON'T THINK THAT THAT'S A -- THEY CAN CALL IT  
6 THE DEPARTMENT OF INJUSTICE AT THIS POINT BASED ON EVERYTHING  
7 THAT'S COMING OUT OF THERE. I WOULD PREFER TO DO THE  
8 INVESTIGATION HERE IN A COURTROOM WHERE PEOPLE ARE UNDER OATH,  
9 WHERE I CAN SUBPOENA THEM, PUT THEM ON THE STAND, AND LET THEM  
10 EITHER INVOKE OR NOT INVOKE.

11 THE COURT: ANYTHING ELSE, MR. FORGE?

12 MR. FORGE: I WOULD, AGAIN -- I THINK YOUR HONOR HAS  
13 ATTEMPTED TO DO THIS AS WELL -- PUT THIS CONTEXT IN TERMS OF  
14 THE ALLEGATIONS. I'M NOT COMMENTING ON ANYTHING OTHER THAN  
15 JUST THE SUBSTANCE OF THIS SITUATION IS ONE IN WHICH EVEN IF  
16 YOU ACCEPT THE ALLEGATIONS AS BEING TRUE, THE INFORMATION THAT  
17 THESE INDIVIDUALS WERE GOING TO BE INDICTED AND THE TYPES OF  
18 CHARGES IS WHAT WAS ALLEGED TO HAVE BEEN LEAKED. THAT  
19 INFORMATION WAS MADE PUBLIC WITHIN A COUPLE OF WEEKS AFTER THE  
20 ALLEGED LEAK. SO WE REALLY DO HAVE TO PUT THIS IN CONTEXT.

21 I'M NOT TRYING TO FORGIVE OR EXCUSE ANYTHING. I'M  
22 NOT TRYING TO DEFEND WHAT HAS OR HAS NOT BEEN DONE IN RESPONSE  
23 TO THAT. BUT I REALLY THINK THAT IN TERMS OF THIS CASE, WE  
24 NEED TO KEEP THAT IN MIND.

25 THE COURT: I AGREE.

1 MR. MAC DOUGALL, ANYTHING MORE, OR MR. GRANGER?

2 MR. MAC DOUGALL: NO.

3 MR. GRANGER: BRIEFLY, JUDGE.

4 I DO THINK IT'S A BIT DISINGENUOUS FOR THE  
5 GOVERNMENT TO THROW UP ITS COLLECTIVE HANDS AND SAY, "GEE, IT  
6 JUST HAPPENED. WITH RESPECT TO THE INTERNAL INVESTIGATION  
7 BEING CLOSED, IT REALLY HAS NOTHING TO DO WITH US AND NOTHING  
8 TO DO WITH THE TRIAL SCHEDULE."

9 IN FACT, I WOULD JUST REFER THE COURT'S ATTENTION TO  
10 PAGES 17 AND 18 OF THE TRANSCRIPT OF THE APPEARANCE BACK IN  
11 MAY WHEN YOUR HONOR SPECIFICALLY SAID THAT THE REASON YOU WERE  
12 NOT GOING TO GO FORWARD WITH YOUR OWN INVESTIGATION WAS THE  
13 REPRESENTATION BY THE GOVERNMENT, BY THE PROSECUTION TEAM IN  
14 THIS CASE, THAT THERE WAS -- AND I'M QUOTING THEM -- "AN  
15 ONGOING INVESTIGATION," CLOSED QUOTE.

16 SO IT WAS AT THE IMPLORING OF THE PROSECUTORS IN  
17 THIS CASE THAT YOU DID NOT PROCEED WITH YOUR OWN HEARING THAT  
18 PROBABLY COULD HAVE BEEN COMPLETED WELL BEFORE NOW. AND NOW  
19 TWO MONTHS BEFORE TRIAL, WE'RE TOLD THAT THE GOVERNMENT,  
20 WITHOUT EVEN CONTACTING, OBVIOUSLY, RELEVANT WITNESSES HAS  
21 CLOSED -- AGAIN, I DON'T EVEN KNOW IF YOU'D CALL IT AN  
22 INVESTIGATION. IT DOESN'T BECAUSE THIS INFORMATION IS  
23 IMPORTANT. THE COURT DEEMED IT VERY IMPORTANT AND ONLY  
24 DEFERRED HOLDING ITS OWN HEARINGS BASED ON THE REPRESENTATION  
25 TO THE COURT FROM THIS PROSECUTION TEAM THAT THERE WAS AN

1 ONGOING INVESTIGATION.

2 THE COURT: I AGREE, MR. GRANGER, WITH EVERYTHING  
3 YOU SAID. I THINK THE DEPARTMENT OF JUSTICE AND THE  
4 COMPONENTS THAT WERE REFERRED THIS MATTER FOR INVESTIGATION  
5 HAVE PUT THE PROSECUTORS HERE IN A REAL BIND. THEY ARE  
6 RECUSED. I UNDERSTAND THAT. BUT I'M ALSO TROUBLED, AS YOU  
7 SAY, BY THE PROSECUTOR'S RESPONSE, WHICH IS TO THROW UP THEIR  
8 COLLECTIVE HANDS AND SAY, "WE KNOW WE TOLD YOU THIS, BUT THE  
9 OTHER GUYS ARE RESPONSIBLE FOR NOT IMPLEMENTING, AND THEY  
10 DIDN'T IMPLEMENT."

11 MR. FORGE, IT IS VERY SURPRISING TO ME THAT AN  
12 INVESTIGATION LIKE THIS WOULD BE CLOSED WITHOUT ANY ATTEMPT TO  
13 INTERVIEW MR. GERAGOS OR MR. MAC DOUGALL. THAT'S JUST  
14 MIND-BOGGLING TO ME, PARTICULARLY WHEN THEY'RE THE TWO -- AND  
15 I HAVE NO REASON TO SECOND-GUESS OR DISCOUNT THE  
16 REPRESENTATIONS THAT WERE MADE.

17 THE INFERENCES THAT WERE DRAWN FROM THE FACTS THAT  
18 WERE REPRESENTED TO ME, THAT'S SOMETHING ELSE. I DON'T THINK  
19 FOR A MINUTE, AS I SAID, THAT MS. LAM HAD ANYTHING TO DO WITH  
20 LEAKING THIS TO TRY TO PRESERVE HER JOB. I REALLY THINK THAT  
21 THAT'S FAR-FETCHED.

22 WHAT DO I REALLY BELIEVE? I THINK THAT PROBABLY  
23 SOMEONE HAD ACCESS TO ONE OF THESE DRAFT INDICTMENTS  
24 BEFOREHAND. IT MIGHT HAVE BEEN SOMEBODY IN INDICTMENT REVIEW.  
25 IT MIGHT HAVE BEEN SOMEBODY WHO WAS TOLD BY SOMEBODY IN THE

1 INDICTMENT REVIEW. AND SOMEBODY CALLED A REPORTER WITH A  
2 JUICY BIT OF NEWS AND FILLED THEM IN ON ENOUGH DETAIL THAT  
3 THAT TRIGGERED THE CALL TO THESE GENTLEMEN. IF THAT PERSON  
4 WHO DID THAT IS A WITNESS, THEN I THINK THEY'RE ENTITLED TO  
5 KNOW THAT.

6 HERE'S WHAT I'M GOING TO DO: I DENY THE MOTION AT  
7 THIS POINT TO DISMISS. I CONFIRM THE DECISION TO DENY THAT  
8 MOTION. THE MOTION TO DISMISS FOR GRAND JURY VIOLATION IS  
9 DENIED WITHOUT PREJUDICE. I'M NOT GOING TO LET IT INTERFERE  
10 WITH THE TRIAL DATE.

11 YOU'RE FREE, MR. GERAGOS, IN THE EVENT THAT  
12 THERE IS A VERDICT IN THIS CASE ADVERSE TO YOUR CLIENT OR,  
13 MR. MAC DOUGALL, ADVERSE TO YOUR CLIENT, TO RENEW THE MOTION.  
14 AT THAT TIME, IF THERE HAS NOT BEEN AN INVESTIGATION BY THE  
15 DEPARTMENT OF JUSTICE, THEN IT MIGHT WELL BE TIME FOR THE  
16 COURT TO AUTHORIZE THE INVESTIGATION THAT MR. GERAGOS IS  
17 TALKING ABOUT WHERE REPORTERS ARE CALLED IN. I DON'T THINK  
18 THAT THAT'S NECESSARY AT THIS POINT.

19 I MAKE THAT DECISION BECAUSE I'VE LOOKED AT THE  
20 ARGUMENT ABOUT PREJUDICE JUMPING AHEAD. IT'S FAIRLY APPARENT,  
21 AT LEAST IN MR. WILKES'S CASE, THAT THERE WAS SOME  
22 IDENTIFICATION OF MR. WILKES, PERHAPS BY HIM OR PEOPLE  
23 ASSOCIATED WITH HIM, AS SOMEONE WHO WAS IMPLICATED IN THE  
24 CUNNINGHAM CASE WELL BEFORE THIS STORY WAS REPORTED ABOUT AN  
25 IMMINENT INDICTMENT.

1           NOW, THAT DOESN'T COVER THE RULE 6 VIOLATION. I  
2 UNDERSTAND THAT. BUT IT GOES TO THE ISSUE OF PREJUDICE AND  
3 WHAT THE REMEDY MIGHT BE IF WE GET TO THE BOTTOM OF IT AND  
4 FIND OUT THAT SOMEBODY LEAKED THAT.

5           IN LARGE PART, THE LIKELIHOOD OF CHARGES AGAINST  
6 MR. WILKES BEING REFERENCED BY THE UNITED STATES, THE SPECTER  
7 OF THAT, AT LEAST, WAS ALREADY OUT THERE. AND TO SOME EXTENT,  
8 IT WAS OUT THERE BECAUSE MR. WILKES OR REPRESENTATIVES  
9 SPEAKING ON HIS BEHALF SAID, "ALL RIGHT. I'M CO-CONSPIRATOR  
10 NO. 3." OR "I ACKNOWLEDGE THAT THEY'RE TALKING ABOUT ME. I  
11 DIDN'T DO ANY OF THIS, BUT I ACKNOWLEDGE THAT THEY'RE TALKING  
12 ABOUT ME."

13           SO HIS IDENTITY AS SOMEONE WHO WAS SUSPECTED OR  
14 IMPLICATED IN THIS WAS OUT THERE. THE QUESTION, I SUPPOSE, IS  
15 DID IT PREJUDICE HIM OR WILL IT PREJUDICE HIM TO AN EXTENT  
16 THAT IMPAIRS HIS RIGHT TO GET A FAIR TRIAL HERE? WE'RE GOING  
17 TO GO THROUGH A VOIR DIRE. I'LL HAVE AN OPPORTUNITY TO ASSESS  
18 THAT WHEN WE TALK TO THE PROSPECTIVE JURORS. I'VE SET A  
19 TIMETABLE ALREADY FOR QUESTIONNAIRES THAT CAN BE SENT OUT TO A  
20 POOL OF PEOPLE. WE'LL HAVE ANOTHER ASSESSMENT WHEN PEOPLE  
21 RESPOND TO THAT. ALL OF THAT WILL INFORM THE DECISION ON  
22 PREJUDICE. I FIND THAT CAN'T BE MADE NOW EVEN IF WE DO GET TO  
23 THE BOTTOM OF THIS.

24           IN THE EVENT THAT MR. WILKES AND MR. FOGGO ARE  
25 ACQUITTED OF THE CHARGES, THEN IT MAYBE BECOMES MOOT, MAYBE IT

1 DOESN'T. MAYBE THE COURT PURSUES IT ON ITS OWN.

2 I HAVE TO TELL YOU, MR. FORGE, I KNOW IT'S NO DOING  
3 ON YOUR PART, BUT I'M VERY DISSATISFIED WITH THIS. A  
4 DEPARTMENT THAT PRIDES ITSELF ON THOROUGH INVESTIGATIONS, THIS  
5 HAS GOT TO BE AN ABERRATION. AS I SAID, I JUST CAN'T  
6 UNDERSTAND HOW THEY CAN CLOSE AN INVESTIGATION WITHOUT AT  
7 LEAST TALKING TO COUNSEL. THAT WASN'T A HERCULEAN TASK. PICK  
8 UP THE PHONE AND CALL MR. GERAGOS AND SAY, "WHAT WERE YOU  
9 TOLD? WHAT WAS THE GIST OF THIS?" OR "CALL MR. MAC DOUGALL  
10 AND ASK HIM." OR MR. GRANGER EVEN SAYS, "I WAS WAITING. I  
11 HAD INFORMATION, TOO."

12 I'M NOT LAYING THAT ON YOU, BUT THE BUCK STOPS WITH  
13 YOU TODAY. YOU'RE THE REPRESENTATIVE OF THE DEPARTMENT OF  
14 JUSTICE, YOU AND MS. CHU AND MR. HALPERN. SO I THINK YOU'VE  
15 GOT TO TAKE SOME OF THIS THIS AFTERNOON.

16 BUT THE MOTION'S DENIED WITHOUT PREJUDICE. I'M  
17 GOING TO ORDER, MR. FORGE, THAT YOU ASK EACH ONE OF YOUR  
18 WITNESSES THAT YOU INTEND TO CALL WHETHER THEY WERE  
19 RESPONSIBLE FOR THIS. AND IF YOU GET AN AFFIRMATIVE ANSWER,  
20 YOU'RE TO TURN THAT OVER IMMEDIATELY. BUT YOU'RE SPECIFICALLY  
21 TO INQUIRE OF EACH AND EVERY WITNESS YOU INTEND TO CALL  
22 WHETHER THEY WERE THE RESPONSIBLE PARTIES FOR THIS. AND IF IT  
23 COMES TO YOU EITHER IN THAT FORM OR ANY OTHER FORM, WHO MIGHT  
24 HAVE BEEN RESPONSIBLE FOR THIS, I WANT YOU TO NOTIFY  
25 MR. GERAGOS AND MR. MAC DOUGALL RIGHT AWAY AND THE COURT.



1 I CONSIDER IT, IN THE CASE OF A WITNESS WHO WOULD  
2 TESTIFY FOR THE GOVERNMENT, EXCULPATORY EVIDENCE. I THINK IT  
3 IS CLEARLY IMPEACHMENT EVIDENCE. I THINK IT GOES BY BIAS AND  
4 MOTIVATION TO TESTIFY IN A PARTICULAR WAY. FRANKLY, I THINK  
5 ALL THE DEFENSE COUNSEL COULD MAKE A FIELD DAY WITH THAT, WITH  
6 A PARTICULAR WITNESS WHO ADMITTED THAT THEY VIOLATED THE RULE  
7 AND LEAKED THIS INFORMATION. SO I'M GOING TO REQUIRE THAT YOU  
8 DO THAT INDEPENDENT OF ANYTHING ELSE THAT HAPPENS.

9 MR. GERAGOS, YOU CAN RENEW THE MOTION. IN THE EVENT  
10 THAT THERE'S A GUILTY VERDICT IN THIS CASE, WE'LL MAYBE HAVE  
11 THE HEARING THAT YOU'VE TALKED ABOUT. AND IF I DETERMINE AT  
12 THE END OF THAT HEARING THAT THERE WAS PREJUDICE TO YOUR  
13 CLIENT, THEN I HAVE THE POWER AND THE AUTHORITY AND THE  
14 JUSTIFICATION TO SET ASIDE THE VERDICT AND TO DISMISS THE  
15 INDICTMENT. BUT I'M NOT GOING TO LET IT, AT THIS POINT,  
16 INTERFERE WITH THE TRIAL DATE THAT WE HAVE SET.

17 I THINK I'VE GIVEN YOU ALL THE PROTECTION I CAN GIVE  
18 YOU AT THIS POINT, WHICH IS TO ORDER THE PROSECUTORS TO ASK  
19 SPECIFICALLY OF THE WITNESSES THAT THEY INTEND TO CALL WHETHER  
20 THEY WERE THE RESPONSIBLE PARTIES.

21 MR. GERAGOS: COULD THEY ALSO PLAY ROUND ROBIN AND  
22 ASK EACH OTHER IF THEY WERE THE RESPONSIBLE PARTIES?

23 THE COURT: WELL, I'M ASSUMING -- I HAVE  
24 REPRESENTATIONS FROM LAWYERS THAT ARE VERY EXPERIENCED, HAVE  
25 BEEN HERE FOR A LONG TIME, JUST AS I TRUST YOU AND THE

1 REPRESENTATIONS I GOT IN THE DECLARATION ABOUT WHAT WAS SAID  
2 BY THE REPORTERS.

3 AND MR. MAC DOUGALL, I'M GOING TO ASSUME THAT  
4 THEY'RE NOT SITTING HERE AS A GUILTY PARTY LETTING ME GO  
5 THROUGH THIS EXERCISE IN FUTILITY. I WOULD BE VERY UPSET IF  
6 THAT WAS THE CASE. I DON'T BELIEVE THAT TO BE SO. I'VE KNOWN  
7 THESE LAWYERS FOR A LONG TIME. THEY'RE PEOPLE OF INTEGRITY  
8 JUST AS YOU ARE, AND JUST AS MR. MAC DOUGALL IS.

9 MR. GERAGOS: THE ONE ISSUE THAT THE COURT HAS NOT  
10 ADDRESSED, THOUGH, IN TERMS OF PREJUDICE IS THAT ONE OF THE  
11 BASES FOR THE MOTION TO DISMISS WAS SPECIFICALLY THAT BY  
12 PUBLICIZING THIS AND LEAKING THIS WEEKS, IF NOT MONTHS, IN  
13 ADVANCE OF THE INDICTMENTS, THAT THAT CAUSED AN ATMOSPHERE OR  
14 CREATED AN ATMOSPHERE WHERE THE GRAND JURY FELT OBLIGED TO  
15 INDICT. SO WAITING UNTIL AFTER THERE'S A TRIAL, I DON'T  
16 BELIEVE THAT WE GRAPPLE WITH THAT ISSUE.

17 THE COURT: I'LL STILL BE ABLE TO ASSESS THAT,  
18 MR. GERAGOS. THAT'S ANOTHER ONE OF THE INFERENCES THAT I  
19 STRUGGLE WITH. AS I SAID, FOR THE LAST SEVERAL YEARS, I'VE  
20 BEEN THE PERSON THAT IMPANELS THE GRAND JURY. IF YOU COULD  
21 GET A COPY OF THE TRANSCRIPT, YOU'D SEE HOW CLEAR I MAKE IT TO  
22 THEM THAT THEY MUST ASSESS PROBABLE CAUSE, THEY SHOULDN'T BE  
23 STAMPEDED INTO ANYTHING, THAT THEIR ROLE AND THEIR OBLIGATION  
24 OF CONSCIENTIOUS IS THE SAME AS THAT OF THE TRIAL JURY. THAT  
25 IF THEY'RE NOT CONVINCED THERE'S PROBABLE CAUSE, THEY SHOULD

1 NOT INDICT.

2 I GO OVER THE HOST OF HORRIBLES WITH THEM THAT  
3 OCCURS WHEN SOMEONE IS WRONGLY CHARGED; THAT IT RUINS THEIR  
4 REPUTATION, THAT ACCUSATIONS ARE EASY TO MAKE AND HARD TO  
5 DEFEND AGAINST. MR. WILKES HAS TAKEN THAT POSITION IN THIS  
6 CASE. "WHAT DO I DO? HOW DO I GET MY REPUTATION BACK?"  
7 BELIEVE ME, I GO OVER ALL OF THAT WITH THE GRAND JURY. I TELL  
8 THEM THAT A PUBLIC CHARGE AGAINST A PERSON CAN BE THE DEATH OF  
9 A CAREER. IT CAN CAUSE FAMILY PROBLEMS. IT CAN DO ALL THE  
10 THINGS THAT YOU AND I AND THE PROSECUTORS AND MR. WILKES KNOW.

11 SO HAVING GIVEN THE GRAND JURY, LIKELY THE GRAND  
12 JURY THAT HEARD THIS CASE, THAT ADMONITION, I'M NOT PREPARED  
13 AT THIS POINT TO JUMP TO THE CONCLUSION THAT THEY IGNORED IT  
14 AND WERE STAMPEDED BY PUBLIC PRESSURE OR ANYTHING ELSE.

15 I REALLY STRESS TO GRAND JURORS WHEN IMPANELING THEM  
16 THAT THEY HAVE TO ACT INDEPENDENTLY OF THE GOVERNMENT, AND  
17 THEY HAVE TO REACH A CONSCIENTIOUS DECISION THAT A CRIME WAS  
18 COMMITTED AND THE PERSON WHO'S PROPOSED FOR INDICTMENT  
19 COMMITTED IT.

20 AGAIN, I HAVEN'T FAILED TO CONSIDER THAT. THAT'S ON  
21 MY MIND. IT'S AN UNLIKELY INFERENCE IN THIS CASE AND ONE THAT  
22 DOESN'T, IN MY JUDGMENT, JUSTIFY POSTPONING THE TRIAL. SO THE  
23 MOTION IS DENIED WITHOUT PREJUDICE. YOU MAY RE-BRING THE  
24 MOTION AT SUCH TIME THAT IT'S APPROPRIATE, AND I'LL RECONSIDER  
25 IT.

1 MR. GRANGER: YOUR HONOR, THIS IS RAYMOND GRANGER.

2 YOU HAD INDICATED TO THE GOVERNMENT TO ASK THEIR  
3 WITNESSES ABOUT KNOWLEDGE OF THE LEAKS. AND ANYTHING THEY  
4 FIND OUT IN THAT REGARD, GOVERNMENT COUNSEL HAS TO NOTIFY  
5 MR. MAC DOUGALL AND MR. GERAGOS.

6 CAN YOU ADD ME TO THAT LIST?

7 THE COURT: I WILL. I'M SORRY. THAT WAS JUST AN  
8 OVERSIGHT ON MY PART.

9 MR. GRANGER AND ALL DEFENSE COUNSEL, OF COURSE.

10 MR. GRANGER: THANK YOU, JUDGE.

11 THE COURT: YOU'RE WELCOME.

12 MR. MAC DOUGALL: AS I HEARD, THE COURT'S ORDERED  
13 MR. FORGE TO INQUIRE AS TO EVERY PROSPECTIVE WITNESS WHETHER  
14 HE OR SHE WAS THE SOURCE OF THE LEAK. I'D LIKE TO ASK IF THE  
15 COURT CAN CONSIDER EXPANDING THAT AND ASK IF THEY HAVE  
16 KNOWLEDGE OF THE SOURCE OF THE LEAK. OBVIOUSLY, IF THE  
17 GOVERNMENT IS GOING TO PUT UP CASE AGENT NO. 1 AND HE HAS NO  
18 KNOWLEDGE OF THE LEAK, BUT KNOWS THAT CASE AGENT NO. 2 SITTING  
19 ACROSS THE CUBICLE FROM HIM WAS THE ONE WHO DID IT --

20 THE COURT: THAT'S A FAIR REQUEST. I'LL EXPAND IT  
21 TO INCLUDE THAT, MR. FORGE, WHEN YOU MAKE YOUR INQUIRIES.  
22 OBVIOUSLY, IF, AT ANY POINT, YOU OR MS. CHU OR MR. HALPERN  
23 BECOME AWARE OF WHO DID THIS, THEN I WANT TO KNOW RIGHT AWAY.  
24 AND MR. MAC DOUGALL POSITS THE SITUATION WHERE MAYBE YOU DON'T  
25 CALL A WITNESS BECAUSE -- WE'RE NOT GOING TO GET TO THAT, I'M

1 SURE. AT SUCH POINT THAT YOU HAVE A STRONG SUSPICION THAT  
2 SOMEONE LEAKED THIS, I WOULD WANT YOU TO CALL ME AND SCHEDULE  
3 AN EX PARTE MEETING AND TELL ME WHAT YOU'VE HAD. AND THAT MAY  
4 CHANGE THE TIMING OF WHEN I WOULD GO FORWARD WITH THIS,  
5 PARTICULARLY IF IT'S SOMEBODY WHO IS A PROSPECTIVE WITNESS IN  
6 THE CASE. I DON'T FORECLOSE THAT THE DEFENDANTS MAY WANT TO  
7 CALL THIS PERSON AFFIRMATIVELY.

8 SO IT, AT ANY POINT, THAT YOU KNOW OR YOU STRONGLY  
9 SUSPECT WHO WAS RESPONSIBLE FOR THIS, I EXPECT YOU TO TELL ME.  
10 AND, IN TURN, I'LL PASS THE INFORMATION ON TO ALL DEFENSE  
11 COUNSEL.

12 MR. FORGE: I'VE BEEN NODDING ALONG WITH WHAT YOU'RE  
13 SAYING FOR THE RECORD. I UNDERSTAND WHAT YOU'RE SAYING, AND  
14 WE'LL FOLLOW YOUR HONOR'S DIRECTIONS TO THE LETTER.

15 THE COURT: THANK YOU.

16 NOW, MR. GERAGOS, LET ME TURN TO THE OTHER ISSUE,  
17 WHICH LARGELY CONCERNS YOU. THE GOVERNMENT'S ASKED ME TO  
18 RECONSIDER.

19 AND MR. WILKES, WHY DON'T YOU HAVE A SEAT. I DON'T  
20 WANT YOU TO HAVE TO STAND UP THE WHOLE TIME. YOU CAN SIT  
21 RIGHT THERE BEHIND YOUR COUNSEL.

22 MR. WILKES: THANK YOU, YOUR HONOR.

23 THE COURT: I'VE GOTTEN A MOTION TO RECONSIDER  
24 WHETHER THE APPROPRIATE THING IN THIS CASE IS TO TAKE A  
25 WAIVER. I'VE TAKEN A WAIVER FROM MR. WILKES.

1 JUST TO RECAP BRIEFLY, I'VE EXPLAINED TO HIM THAT  
2 THERE IS INFORMATION, NUMBER ONE, THAT THE GOVERNMENT  
3 CONSIDERS CLASSIFIED; NUMBER TWO, THAT THE GOVERNMENT  
4 CONSIDERS MATERIAL TO THEIR PROOF OF THE ALLEGATIONS IN THIS  
5 CASE. THEY DON'T WANT TO TURN THAT MATERIAL OVER BECAUSE OF  
6 ITS CLASSIFIED NATURE WITHOUT COUNSEL, ALL COUNSEL WHO HAVE  
7 ACCESS TO IT GOING THROUGH A SECURITY CHECK.

8 I'VE ADMITTED, MR. GERAGOS, THE FIRST TIME YOU WERE  
9 HERE I HAVE A LITTLE PROBLEM WITH THAT, YOU KNOW. THAT'S WHAT  
10 THE BALKAN NATIONS DID FOR A LONG TIME, I THINK. THE  
11 GOVERNMENT WAS IN CHARGE OF APPOINTING WHO REPRESENTED PEOPLE.  
12 I DON'T LIKE THAT. THERE'S SOMETHING ABOUT IT. I'M NOT THE  
13 GREATEST CIVIL LIBERATARIAN AROUND, BUT THAT BOTHERS MY  
14 SENSES, TOO; THAT THE UNITED STATES, EITHER THE PROSECUTOR OR  
15 THE COURT, WOULD BE INVOLVED.

16 THIS FELLOW HAS MADE A CHOICE AS TO WHO HIS COUNSEL  
17 IS, AND HE WANTS YOU ON THE CASE. AND HE'S A SMART,  
18 SOPHISTICATED GUY. HE UNDERSTANDS FROM MY ADMONITION TO HIM  
19 LAST TIME WHAT THE EFFECT WOULD BE IF YOU DID NOT GO THROUGH  
20 THIS BACKGROUND SCREENING.

21 BUT I WANT TO TALK TO YOU A LITTLE BIT MORE ABOUT  
22 THIS BECAUSE I THINK YOU OUGHT TO HAVE SOME OF THE  
23 INFORMATION. I WANT TO REVEAL TO YOU THAT IN CONNECTION WITH  
24 THIS, THE PROSECUTOR HAS ASKED TO SEE ME EX PARTE AND IN  
25 CAMERA BECAUSE I HAVE NOT SEEN ANY OF THE INFORMATION EITHER.

1 I UNDERSTAND AT SOME POINT IT'S GOING TO BE MY OBLIGATION IF  
2 THERE'S A NEED TO PUT ON SOME OF THE INFORMATION THAT'S  
3 CATEGORIZED AS CLASSIFIED, THAT I'LL HAVE TO MAKE RULINGS ON  
4 IT.

5 BUT I THINK THEY, IN GOOD FAITH, THOUGHT THAT "LOOK,  
6 JUDGE, YOU DON'T UNDERSTAND THE CONTEXT OF THIS UNTIL YOU SEE  
7 SOME OF THE" -- I HESITATE TO USE THIS WORD -- "NITTY-GRITTY."  
8 I'VE USED IT BEFORE WITH THESE PROSECUTORS, AND IT'S COME BACK  
9 TO BITE ME. BUT THEY WANTED ME TO ACTUALLY SEE SOME OF THIS  
10 AND TO GET A FIRSTHAND PERSPECTIVE ON WHY YOU WOULD WANT TO  
11 HAVE THE INFORMATION, WHY MR. WILKES WOULD WANT TO HAVE THIS  
12 INFORMATION.

13 I KNOW YOU'VE SAID TO ME AND MR. WILKES HAS SAID TO  
14 ME "I KNOW THE INFORMATION ALREADY." I'M NOT SURE THAT THAT'S  
15 TRUE. I'M NOT SURE THAT YOU HAVE A COMPREHENSIVE IDEA OF THE  
16 INFORMATION. FOR EXAMPLE, THERE MAY HAVE BEEN THINGS THAT  
17 HAPPENED THAT TRIGGERED OTHER THINGS THAT MR. WILKES WAS  
18 UNAWARE OF THAT ARE PART OF THE INFORMATION. I MEAN, YOU CAN  
19 CONCEIVE THAT SCENARIO.

20 NOW, THE PROBLEM I HAVE IS THAT THE GOVERNMENT HAS  
21 TAKEN THE POSITION -- THEY'VE ASKED ME TO SORT OF IMPOSE THIS  
22 ON YOU INDEPENDENT OF THEIR INVOLVEMENT. I'M RELUCTANT TO DO  
23 THAT.

24 I THINK THERE'S A PROBLEM WITH THAT, MR. HALPERN.  
25 EVEN IF THE COURT WERE TO ORDER IT, THE COURT SECURITY

1 OFFICER, MR. LONDERGAN, IS HERE TODAY. IN PREPARATION FOR  
2 THIS HEARING, I ASKED HIM TO MAKE INQUIRIES. I SAID, "WHAT IF  
3 I WERE TO ORDER THIS AND THE UNITED STATES PROSECUTORS WEREN'T  
4 TO HAVE ANY INVOLVEMENT IN THIS AT ALL? COULD IT HAPPEN?"

5 HIS ANSWER TO ME WAS "NO." THE PEOPLE THAT DO THESE  
6 INVESTIGATIONS WILL NOT DO THEM WITHOUT THE CONSENT OF THE  
7 PERSON THAT'S BEING SCRUTINIZED. AND FURTHERMORE, THE NATURE  
8 OF THE INVESTIGATION, THE CLEARANCE THAT'S NECESSARY, REQUIRES  
9 FIRSTHAND INFORMATION FROM THE PERSON: MR. GERAGOS. I JUST  
10 MET HIM PERSONALLY IN THIS LAST YEAR. I DON'T KNOW ENOUGH TO  
11 TELL THEM THE STUFF THEY NEED TO KNOW TO DO THIS TOP SECRET  
12 SECURITY CLEARANCE.

13 BUT I'VE SEEN -- I'VE NOW REVIEWED, I THINK, JUST  
14 ABOUT EVERY CASE, EVERY PUBLISHED CASE, DISTRICT COURT CASE  
15 AND COURT OF APPEALS CASE. THERE IS AUTHORITY, MR. GERAGOS,  
16 THAT I COULD IMPOSE THIS. AND I COULD IMPOSE THIS AT THE COST  
17 OF RELIEVING YOU IF YOU DIDN'T GO ALONG WITH IT. THERE IS  
18 AUTHORITY. IN FACT, I THINK THAT THAT'S PROBABLY THE MAJORITY  
19 POSITION. JUDGE SAND OUT OF SOUTHERN DISTRICT OF NEW YORK HAS  
20 WRITTEN A FREQUENTLY CITED OPINION THAT SAYS THE COURT HAS THE  
21 AUTHORITY TO DO THIS.

22 AT FIRST I THOUGHT I'D MADE A MISTAKE BY SAYING THAT  
23 THIS WAS A PREREQUISITE TO YOU GETTING THE MATERIAL. BECAUSE  
24 THE REGULATIONS THEMSELVES THAT WERE PROMULGATED BY CHIEF  
25 JUSTICE BURGER ARE NOT PART OF CIPA EXPRESSLY. AS I LOOKED



1 CAREFULLY AT THE CASES THAT I LOOKED AT, I LOOKED AT  
2 SUBSECTION 9 OF THE CLASSIFIED INFORMATION PROTECTION ACT AT  
3 THE TIME THE STATUTE WAS ENACTED DELEGATED TO THE THEN CHIEF  
4 JUSTICE THE RESPONSIBILITY OF PROMULGATING REGULATIONS THAT  
5 WOULD IMPLEMENT THE PROVISIONS. AND ONE OF THE REGULATIONS  
6 THAT CAME AS A RESULT OF THAT WAS THIS IDEA THAT PEOPLE OUGHT  
7 TO BE CLEARED BEFORE THEY HAVE ACCESS TO THIS DEFENSE COUNSEL.

8 NOW, WHAT THE CASES HAVE MADE CLEAR TO ME IS THAT  
9 IT'S NOT AN ABSOLUTE REQUIREMENT. AND THERE ARE SOME CASES --  
10 I FOUND TWO -- WHERE THE JUDGES REFUSED, FOR THE REASONS THAT  
11 YOU'VE RAISED, TO IMPOSE THAT ON DEFENSE COUNSEL. THEY SAID,  
12 "THE 6TH AMENDMENT GIVES MR. WILKES IN THIS CASE THE RIGHT TO  
13 CHOOSE HIS OWN COUNSEL." HE'S DONE SO. I'M NOT GOING TO  
14 INTERFERE WITH THAT.

15 IT'S NOT CLEAR TO ME WHETHER WAIVERS WERE TAKEN IN  
16 THOSE CASES AS I DID IN THIS CASE. I THINK THAT WAS AN EXTRA  
17 LAYER OF PRECAUTION. BUT THE CIRCUMSTANCES HAVE CHANGED A  
18 LITTLE BIT. I HAVE SEEN AN EXCERPT OF THE MATERIAL THAT THEY  
19 HAVE. AND I THINK, GIVEN THE NATURE OF THE CHARGES, THAT YOU  
20 OUGHT TO SEE THAT MATERIAL. YOU REALLY OUGHT TO.

21 I HOPE I CAN PREVAIL UPON YOU, WITHOUT REGARD TO THE  
22 PROSECUTORS OF THE UNITED STATES AT ALL, TO COOPERATE WITH THE  
23 COURT SECURITY OFFICER AND THE COURT ONLY IN PROVIDING SOME  
24 INFORMATION THAT WOULD, I THINK, SATISFY BASELINE.

25 NOW, LET ME SAY THIS: I HAVE NO REASON TO QUESTION

1 YOUR BACKGROUND WHATEVER. YOU'RE AN OFFICER OF THE COURT. I  
2 RESPECT YOU. I RESPECT THE REPRESENTATIONS THAT ARE MADE. I  
3 UNDERSTAND THAT IT'S NOT AT THAT LEVEL. I DON'T THINK ANY OF  
4 THIS IS PERSONAL. IT'S INSTITUTIONAL.

5 MR. GERAGOS: THAT'S EXACTLY RIGHT. IT'S  
6 INSTITUTIONAL. I JUST AM NOT GOING TO, UNDER ANY  
7 CIRCUMSTANCES, SUBMIT MYSELF TO A SECURITY CLEARANCE IN ORDER  
8 TO DEFEND A CLIENT IN A UNITED STATES DISTRICT COURT. THEY  
9 HAVE TO PRESENT THE EVIDENCE TO A JURY. I'LL JUST GO BACK TO  
10 IT. WHATEVER THEY'VE SHOWN YOU, IF IT'S EXCULPATORY, THEY'VE  
11 GOT TO GIVE IT. IF IT'S NOT EXCULPATORY AND IT'S  
12 INCRIMINATORY, THEY'VE GOT TO PUT IT IN FRONT OF THE JURY.

13 AND I HATE TO BE SO SIMPLISTIC ABOUT IT. I KNOW  
14 THEY'VE LIKENED IT TO ME USING THE TERM "TRUMP" AS A CARD GAME  
15 OR WHATEVER ELSE. BUT I'M NOT -- ESPECIALLY -- I MEAN,  
16 THERE'S A CERTAIN DEGREE OF IRONY THAT WE'RE HERE TODAY AND WE  
17 CAN'T -- THE DEPARTMENT OF JUSTICE BASICALLY SWOOPED THIS  
18 THING UNDER THE BUS IN TERMS OF THIS INVESTIGATION, IF YOU  
19 WANT TO CALL IT AN INVESTIGATION. IT'S REALLY AN ABOMINATION.

20 THEY DIDN'T DO ANYTHING ABOUT IT. THEY LEAKED.  
21 THEY DESTROYED -- THEY SAY THERE'S NO PREJUDICE. I'LL TELL  
22 YOU, THEY PREJUDICED MY CLIENT TO THE TUNE OF \$3 MILLION BY  
23 FORCING HIM OUT OF THE SALE BECAUSE THEY LEAKED THIS  
24 INFORMATION. I THINK THAT THAT WAS ONE OF THE MAIN REASONS  
25 THEY DID IT. I STILL THINK THAT ONE OF THE REASONS THEY DID

1 IT WAS TO GET THIS GRAND JURY TO INDICT WHETHER THE COURT  
2 THINKS THAT'S A REASONABLE INFERENCE OR NOT.

3 I STILL THINK THAT IT WAS -- AS I SIT HERE TODAY,  
4 THAT IT WAS LEAKED DELIBERATELY AS A LEVERAGING POSITION. I  
5 UNDERSTAND REASONABLE MINDS CAN DIFFER. BUT WHAT THE -- THE  
6 BEAUTY OF -- THE IRONY OF THIS IS THAT "OKAY. TRUST YOUR  
7 GOVERNMENT"? I DON'T TRUST MY GOVERNMENT. I DON'T TRUST THIS  
8 JUSTICE DEPARTMENT. AND THERE'S NOTHING -- I UNDERSTAND THAT  
9 THEY CAN COME IN EX PARTE ALL THEY WANT.

10 I TRULY APPRECIATE EVERYTHING THE COURT HAS SAID  
11 ABOUT MY INTEGRITY, BUT IT REALLY ISN'T MY INTEGRITY THAT I'M  
12 WORRIED ABOUT. I AM NOT HERE AS AN ADJUNCT TO THE DEPARTMENT  
13 OF JUSTICE. I DON'T TRUST THE DEPARTMENT OF JUSTICE, AND I  
14 DON'T CARE ABOUT ANYTHING THAT THEY WANT TO PUT ME THROUGH.  
15 I'M HERE TO DEFEND MY CLIENT. I'VE GOT LOYALTY TO ONE GUY AND  
16 ONE GUY ONLY. THAT'S BRENT WILKES.

17 THE COURT: THE IRONY WASN'T LOST ON ME THAT, ON THE  
18 ONE HAND, WE'RE TALKING ABOUT LEAKING OF INFORMATION BY  
19 SOMEBODY WHO HAD ACCESS TO IT ON THE GOVERNMENT'S SIDE; AND,  
20 ON THE OTHER HAND, I'M INSISTING THAT YOU GO THROUGH A  
21 BACKGROUND CHECK SO THAT YOU CAN BE TRUSTED WITH INFORMATION.

22 MR. GERAGOS: RIGHT. IN FACT, I'LL MAKE YOU A DEAL.  
23 IF YOU WANT TO LET ME HAVE A HEARING PRE-TRIAL WHERE I CAN PUT  
24 ALL OF THEM UNDER OATH, INCLUDING THEIR CASE AGENTS, AND THEY  
25 CAN GET UP HERE AND YOU LET ME DO THE SAME HEARING WITH THE

1 REPORTERS, I WILL THEN RECONSIDER -- AND I'LL TALK TO MY  
2 CLIENT -- I'LL RECONSIDER GETTING THE SECURITY CLEARANCE IF I  
3 CAN GO AND HAVE MY HEARING ON THEIR LEAK. IF THEY WANT ME TO  
4 GO THROUGH THE SECURITY CLEARANCE, I WANT THEM TO GO THROUGH A  
5 SECURITY CLEARANCE.

6 THE COURT: THAT'S NOT MUCH OF A DEAL.

7 I'M BARGAINING FOR RECONSIDERATION?

8 MR. GERAGOS: NO. IF YOU TELL ME YOU'LL GIVE ME THE  
9 HEARING, THEN I'LL GO OUT AND I'LL SACRIFICE MY PERSONAL  
10 BELIEFS HERE. AND IF YOU GIVE ME THE HEARING PRE-TRIAL, I'LL  
11 GO THROUGH THE SECURITY CLEARANCE.

12 MR. HALPERN: YOUR HONOR, THAT'S A DEAL THAT I THINK  
13 WE'RE ALMOST WILLING TO TAKE, AT LEAST THE LAST ONE, IN THE  
14 SENSE THAT I DON'T BELIEVE MR. GERAGOS SHOULD HAVE TO UNDERGO  
15 SECURITY CLEARANCE THAT THE GOVERNMENT DIDN'T UNDERGO. SO ALL  
16 WE'RE REALLY ASKING IS THAT HE UNDERGO THE SAME SECURITY THAT  
17 MYSELF, MR. FORGE, AND MR. --

18 MR. GERAGOS: AS LONG AS WE CAN AUGMENT IT BY  
19 PUTTING THEIR AGENTS UP HERE AND THEIR FORMER HEAD OF THEIR  
20 OFFICE SO THAT I CAN ASK THEM UNDER OATH IF THEY'RE THE ONES  
21 WHO LEAKED IT. IF THEY WANT TO MAKE THAT TRADE, THEN THERE  
22 WILL NO LONGER BE THE IRONY. I'M WILLING TO THROW MYSELF  
23 UNDER THE BUS IF THEY'RE WILLING TO THROW THEMSELVES UNDER THE  
24 BUS. I DON'T THINK THEY'LL TAKE ME UP ON IT BECAUSE I THINK  
25 THAT THEY KNOW IT CAME FROM THE INNER CIRCLE.

1 SO I'M WILLING TO DO IT. I'M WILLING TO TURN AROUND  
2 NOW. I'LL GO THROUGH THE SECURITY CLEARANCE AS LONG AS I GET  
3 A PRE-TRIAL HEARING.

4 THE COURT: DO YOU HAVE AN IDEA, DO YOU KNOW FROM  
5 EXPERIENCE, MR. GERAGOS, WHAT IS INVOLVED IN ONE OF THESE  
6 SECURITY CLEARANCES?

7 MR. GERAGOS: I DO IN TERMS OF TALKING TO OTHERS  
8 WHO'VE GONE THROUGH IT, YES.

9 THE COURT: WHAT'S YOUR UNDERSTANDING OF WHAT'S DONE  
10 ONCE ONE SUBMITS TO A SECURITY CLEARANCE?

11 MR. GERAGOS: IT DEPENDS ON THE LEVEL. AND IT IS MY  
12 UNDERSTANDING THAT FOR THIS CASE, IT'S NOT THE MOST ONEROUS  
13 THING. IT'S NO -- I SUPPOSE IT WOULD PROBABLY TAKE MORE TIME,  
14 HOWEVER, THAN A PRE-TRIAL HEARING ON WHETHER OR NOT -- WHO IT  
15 WAS THAT LEAKED THIS STUFF.

16 THE COURT: MY UNDERSTANDING IS THE LEVEL OF  
17 CLEARANCE THAT YOU'RE SEEKING IS TOP SECRET?

18 MR. HALPERN: WELL, IT IS, YOUR HONOR, ALTHOUGH I  
19 DON'T THINK IT IS AN ONEROUS BURDEN. ONCE AGAIN, THE COURT  
20 NEEDS TO KNOW THAT THIS WOULD BE A SECURITY CLEARANCE NOT DONE  
21 BY THE GOVERNMENT, PER SE, BUT BY MR. LONDERGAN UNDER HIS  
22 DIRECTION AND THE COURT'S DIRECTION.

23 THE COURT: HE'S IN A BIND, THOUGH, MR. HALPERN,  
24 BECAUSE THE PREMISE OF YOUR MOTION WAS THAT I COULD SOMEHOW  
25 ORDER THIS INDEPENDENT. MR. LONDERGAN SHARED WITH ME AN

1 E-MAIL HE GOT FROM THE FBI WHEN HE MADE AN INQUIRY ON MY  
2 INQUIRY UPON READING THE MOTION WHETHER THIS COULD BE DONE.

3 MR. LONDERGAN, IF YOU'LL STEP UP TO THE LECTERN FOR  
4 JUST A SECOND. I KNOW YOU HAVE IT ON YOUR BLACKBERRY, BUT IF  
5 YOU COULD SUM UP WHAT YOU WERE TOLD.

6 MR. LONDERGAN: YES, YOUR HONOR. THERE'S NO  
7 SHORTCUT IN TERMS OF OBTAINING A SECURITY CLEARANCE THROUGH A  
8 BACKGROUND INVESTIGATION. NO INVESTIGATING AGENCY CAN CONDUCT  
9 A BACKGROUND INVESTIGATION WITHOUT THE WAIVER FORMS BEING  
10 COMPLETED. THAT'S THE APPLICATION FORM AND THE WAIVER FORMS.  
11 THE WAIVER FORMS, FOR EXAMPLE, ARE A TAX CHECK WAIVER AND ALSO  
12 WAIVERS SO THAT PEOPLE CAN BE APPROACHED ON BEHALF OF THE  
13 APPLICANT FOR THE CLEARANCE.

14 THE COURT: AND IF I WERE TO ORDER THAT, IF I WERE  
15 TO ORDER THAT INDEPENDENT OF MR. GERAGOS'S COOPERATION, IS  
16 YOUR UNDERSTANDING THAT THE AGENCY WOULD GO FORWARD OR WOULD  
17 RESIST THE ORDER AND NOT GO FORWARD?

18 MR. LONDERGAN: YOUR HONOR, THERE'S NO INVESTIGATING  
19 AGENCY THAT WE KNOW OF WHO WOULD BE ABLE TO CONDUCT A  
20 BACKGROUND INVESTIGATION IN THAT WAY.

21 THE COURT: THEY NOT ONLY DON'T WANT TO DO IT, BUT  
22 THEY COULDN'T DO IT WITHOUT INFORMATION FROM MR. GERAGOS, IS  
23 WHAT I'VE UNDERSTOOD YOU TO SAY.

24 MR. LONDERGAN: AND IN ANY CASE, ANY SUPERFLUOUS  
25 CHECKS WOULD NOT BE SUFFICIENT TO PROVIDE SUFFICIENT

1 INFORMATION TO THE ADJUDICATION OF A NATIONAL SECURITY  
2 CLEARANCE AT THE HIGHEST POSSIBLE LEVELS.

3 THE COURT: SO IT SEEMS TO ME, GIVEN THAT  
4 INFORMATION, MR. HALPERN, WHAT I WOULD HAVE TO DO IS ISSUE AN  
5 ORDER DIRECTLY TO MR. GERAGOS TO CONSENT; FILL OUT THESE  
6 FORMS, CONSENT, COOPERATE WITH THE INVESTIGATORS. AND I  
7 CAN'T -- ONE OF THE PREMISES WAS -- YOU GAVE ME A NUMBER OF  
8 POSSIBLE SOLUTIONS, THAT I COULD DO THIS SOMEHOW INDEPENDENTLY  
9 OF HIM WHERE HE WAS NOT COERCED INTO COOPERATING WITH THIS. I  
10 THINK GIVEN WHAT MR. LONDERGAN FOUND OUT, THAT THAT'S A  
11 NON-STARTER. I CAN'T DO THAT.

12 MR. HALPERN: I TAKE IT FROM MR. LONDERGAN'S  
13 RESPONSE THAT THAT MAY BE ACCURATE. I WOULD SAY, YOUR HONOR,  
14 THAT WHAT THE GOVERNMENT WAS ATTEMPTING TO DO WAS TO CONVINCE  
15 MR. GERAGOS THAT OUR OFFICE, CLEARLY THE PEOPLE PROSECUTING  
16 HIM, HAD NO DOG IN THIS FIGHT.

17 THERE ARE A NUMBER OF IRONIES HERE. ONE OF THE  
18 IRONIES UNDERLYING ALL OF THIS IS THAT THIS IS NOT THE  
19 GOVERNMENT TRYING TO KEEP INFORMATION AWAY FROM THE DEFENSE.  
20 THIS IS THE EXACT OPPOSITE SITUATION. THE SHOE'S ON THE OTHER  
21 FOOT NOW IN TERMS OF THIS ISSUE. WE'RE TRYING TO GIVE  
22 INFORMATION TO MR. GERAGOS. AND WE'RE TRYING TO DO IT IN A  
23 WAY THAT, A, ALLOWS HIM TO DEFEND HIS CLIENT THOROUGHLY AND  
24 VIGOROUSLY; AND IN A WAY THAT DOESN'T END UP RECUSING HIM OR  
25 ENDING HIS DISQUALIFICATION.

1 THE GOVERNMENT RESPECTS MR. GERAGOS. WE THINK HE'S  
2 BEEN HONORABLE IN MAKING HIS ARGUMENT EVEN IF IT'S WRONG. BUT  
3 CLEARLY, IT'S AN HONORABLE ARGUMENT. AND WE'RE TRYING TO COME  
4 UP WITH A WAY TO ENSURE THAT HE IS ABLE TO REPRESENT  
5 MR. WILKES, BUT IN A WAY THAT, IN FACT, WILL NOT RESULT IN  
6 REVERSIBLE ERROR OR A CLAIM OF UNQUALIFIED COUNSEL.

7 IN THAT REGARD, WE'RE SIMPLY ASKING THAT HE SUBMIT  
8 TO THE SAME PROCEDURE THAT MR. MAC DOUGALL AND EVERYBODY ON  
9 MR. MAC DOUGALL'S STAFF SUBMITTED TO, WHICH, AGAIN, I DO NOT  
10 BELIEVE -- THEY CAN ADDRESS IT THEMSELVES -- WAS SUCH AND  
11 ONEROUS TASK THAT IT WAS SOMETHING THAT MR. GERAGOS SHOULD  
12 FIND REPELLANT.

13 AND IT IS A SIMPLE DECISION. THIS HAS BEEN  
14 DIFFICULT, YOUR HONOR, IN THE SENSE THAT WE DON'T WANT TO  
15 IMPOSE ANY OBLIGATION UPON HIM. BUT WE'RE STUCK HERE.  
16 THERE'S NO ISSUE HERE. WE'VE GOT BRADY MATERIAL THAT SHOULD  
17 GO OVER THAT'S CLASSIFIED. THE ONLY WAY WE CAN TURN IT OVER  
18 IS IF HE SUBMITS TO THE SAME CLEARANCE AS EVERYBODY ELSE  
19 HAVING TO DO WITH THIS CASE, EVERY GOVERNMENT PROSECUTOR AND  
20 AGENT --

21 THE COURT: I'M NOT SURE I AGREE WITH THAT CLAIM.  
22 THAT'S WHERE I PART COMPANY WITH THE UNITED STATES. BRADY IS  
23 A CONSTITUTIONAL DUE PROCESS OBLIGATION. AND WHAT YOU'RE  
24 TALKING ABOUT HERE IS A STATUTE THAT REGULATES THE MANNER OF  
25 PRODUCTION OF MATERIAL THAT HAS TO BE PRODUCED. IT STRIKES ME



1 AS WRONG, MR. HALPERN, TO SAY THAT THE STATUTE CAN TRUMP THIS  
2 CONSTITUTIONAL OBLIGATION TO TURN OVER EXCULPATORY MATERIAL.

3 MR. HALPERN: I COMPLETELY AGREE IT CANNOT TRUMP IT.  
4 ALL THE STATUTE CAN DO -- WE'RE TALKING ABOUT -- AGAIN, YOUR  
5 HONOR, I DON'T WANT TO BLOW IT UP TO MORE THAN IT IS. IT'S A  
6 CONGRESSIONALLY APPROVED STATUTE THAT HAS GIVEN A FRAMEWORK IN  
7 CONJUNCTION WITH THE UNITED STATES SUPREME COURT THAT SAYS,  
8 "OKAY, GOVERNMENT, THERE'S NO TRUMPING. YOU'VE GOT TO GIVE  
9 THEM BRADY. YOU'VE GOT TO GIVE THEM JENCKS, ET CETERA. BUT  
10 YOU'RE ALLOWED TO DO IT IN THIS FASHION. THIS PROTECTS THE  
11 DEFENDANT'S RIGHTS."

12 NOW, THE COURTS HAVE APPROVED THAT. THEY SAID IT'S  
13 APPROPRIATE. AND AS I LOOK AT THE CASES -- AND AGAIN, THERE  
14 ARE ABOUT A HALF A DOZEN CASES -- THEY ALL SUPPORT THE  
15 GOVERNMENT'S ABILITY TO DO THIS UNDER THE FRAMEWORKS WE'RE  
16 ASKING FOR IT.

17 THE COURT: I'M NOT SUGGESTING THAT YOU HAVE TO GIVE  
18 RAW INFORMATION THAT YOU CONSIDER TO BE CLASSIFIED AND BRADY.  
19 BUT I AM SUGGESTING IF YOU SEE SOMETHING THAT LOOKS LIKE IT'S  
20 EXCULPATORY OR IT WOULD PROVE TO BE IMPEACHING EVIDENCE  
21 AGAINST A WITNESS OR THE GOVERNMENT'S CASE, THAT IN THE FORM  
22 THAT CIPA REQUIRES AND PERMITS YOU TO TURN IT OVER, THAT IT  
23 WOULD BE SANITIZED AND TURNED OVER SO THAT COUNSEL WOULD AT  
24 LEAST HAVE THE GIST OF IT, BE ABLE TO MAKE USE OF IT.

25 I THINK THAT'S A -- I DON'T WANT TO USE THE WORD

1 "TRUMP" ANYMORE BECAUSE I SAW THAT YOU WERE TALKING ABOUT CARD  
2 GAMES, AND I DON'T WANT TO GET INTO THAT. BUT I THINK IT'S A  
3 STAND-ALONE OBLIGATION THAT YOU HAVE.

4 AND IF YOU SAY "LOOK, WE'RE BEING BUFFETED BY TWO  
5 OBLIGATIONS: THE OBLIGATION TO GIVE OVER THIS EXCULPATORY  
6 MATERIAL AND THE FACT THAT IT'S CLASSIFIED AND SUBJECT TO A  
7 STATUTE. SO WE'RE GOING TO GIVE IT OVER. WE'RE GOING TO GIVE  
8 IT OVER IN ITS SANITIZED FORM THAT DOESN'T GIVE UP THE GHOST,  
9 BUT WE'RE GOING TO GIVE IT OVER," IS THAT THE GOVERNMENT'S  
10 POSITION? DO YOU INTEND TO DO THAT IRRESPECTIVE OF WHETHER  
11 MR. GERAGOS SUBMITS TO THIS?

12 MR. HALPERN: YOUR HONOR, OUR POSITION, IT HAS BEEN  
13 IN THE PLEADINGS AND IT REMAINS THAT WE HAVE SEVERAL OPTIONS.

14 ONE, WE WERE HOPING WE COULD GET A CLEARANCE WHICH  
15 MR. GERAGOS COULD LIVE WITH. BUT IF MR. LONDERGAN CAN'T  
16 ARRANGE THAT, WE UNDERSTAND IT.

17 BUT ABSENT THAT, THE ONLY OTHER PROCEDURE WE  
18 HAVE THAT CIPA RECOGNIZES IS THE SECTION 4 PROCEDURE, WHICH,  
19 IN FACT, IS WHAT YOU'RE TALKING ABOUT. AND WE BRIEFED THIS  
20 BECAUSE WE DO THINK IT IS AN OPTION.

21 BUT AGAIN, WHEN I SAY THIS, IN OUR PAPERS WE MADE IT  
22 CLEAR THIS IS AN OPTION THAT IS FRAUGHT WITH PERIL FOR A  
23 NUMBER OF REASONS.

24 NUMBER ONE, JUST AT THE OUTSET, IT WILL REQUIRE US  
25 TO LOOK AT WHAT IS IN THE NEIGHBORHOOD OF 17,000 PAGES. IT'S

1 ABOUT -- A LITTLE UNDER 3,000 DOCUMENTS. WE CAN DO THAT. BUT  
2 WE HAVE TO DO IT LINE BY LINE, ITEM BY ITEM, AND MAKE  
3 SUBSTITUTIONS. I INQUIRED AS TO HOW LONG THAT WOULD BE.  
4 AGAIN, DEFENSE ATTORNEYS ARE FOND OF THINKING, AT ANY RATE,  
5 EVERYBODY THAT DOESN'T WORK FOR THE GOVERNMENT IS FOND OF  
6 THINKING THAT THE GOVERNMENT HAS UNLIMITED RESOURCES.

7 I CAN TELL YOU, YOUR HONOR, THERE ARE EXTREMELY FEW  
8 PEOPLE WHO ARE CAPABLE OF DOING A CLASSIFICATION REVIEW, BOTH  
9 BECAUSE THEY HAVE THE CLEARANCE AND THE AUTHORITY TO DO SO,  
10 SITTING WITH THE CIA. THESE INDIVIDUALS WHO DO HAVE THE  
11 ABILITY TO DO THIS ARE WORKING ON NUMEROUS REQUESTS, NOT JUST  
12 THIS CASE. TO PRODUCE THE INFORMATION IN A MANNER THAT WE CAN  
13 PRESENT TO THE COURT WILL TAKE IN THE NEIGHBORHOOD OF SIX  
14 MONTHS BECAUSE WE HAVE TO DO IT LINE BY LINE, ITEM BY ITEM.

15 THE COURT: YOU'RE TALKING JUST EXCULPATORY  
16 INFORMATION? BECAUSE THAT'S ALL I'M TALKING ABOUT AT THIS  
17 POINT. IF MR. GERAGOS PERSISTS IN REFUSING TO GO THROUGH  
18 THIS, I THINK MR. WILKES UNDERSTANDS THE CONSEQUENCE OF THAT  
19 IS HE'S NOT GOING TO GET THE INCULPATORY INFORMATION. AND HE  
20 MAY BE SURPRISED THAT THERE'S SOME THINGS OUT THERE THAT HURT  
21 HIS CASE THAT HE HAD A CHANCE TO KNOW BEFOREHAND AND WAIVED  
22 THAT OPPORTUNITY. SO I'M NOT TALKING ABOUT THAT. I'M TALKING  
23 STRICTLY ABOUT EXCULPATORY MATERIAL WHERE I THINK YOU HAVE A  
24 STAND-ALONE OBLIGATION TO GIVE THAT OVER.

25 MR. HALPERN: TO GIVE YOU AN IDEA, EVERY SINGLE

1 WITNESS REPORT WE HAVE COULD BE CLASSIFIED LIKE THAT. AND THE  
2 REASON IT IS, YOUR HONOR, IS BECAUSE IN THE FORM THAT WE WILL  
3 TURN IT OVER, HE WILL NOT EVEN BE ABLE TO RECOGNIZE THE PERSON  
4 WHO'S MAKING THE STATEMENTS BECAUSE THEY'RE GOING TO BE  
5 CLASSIFIED. THEY INVOLVED INDIVIDUALS WHO MAY BE UNDERCOVER  
6 OR HAVE BEEN UNDERCOVER. HE WILL BE UNABLE TO DO ANY TYPE OF  
7 BACKGROUND REVIEW ON THESE PEOPLE BECAUSE HE WON'T EVEN KNOW  
8 WHO THEY ARE.

9 THE COURT: MAYBE HE WILL. HE EXPRESSED CONFIDENCE  
10 THAT HE KNEW THE INFORMATION ALREADY AT THE FIRST HEARING.

11 MR. HALPERN: YOUR HONOR, FOR THIS TO BE AT ALL  
12 EFFECTIVE -- AND AGAIN, I'M NOT SAYING OF THE 17,000, MAYBE  
13 THERE AREN'T SOME PAGES THEY'RE AWARE OF. BUT THERE ARE  
14 CLEARLY THOUSANDS OF PAGES THAT WE CAN'T BE IN THE POSITION OF  
15 SAYING, "HE DOESN'T NEED TO THIS, THE DEFENDANT. HE DOESN'T  
16 NEED TO KNOW THAT."

17 AT A MINIMUM, WHAT IS CONTEMPLATED BY SECTION 4,  
18 MAKE NO MISTAKE ABOUT IT, IS WE MAKE THESE SUBSTITUTIONS. WE  
19 GIVE THESE DOCUMENTS TO THE COURT. AND SAY IT GOES FROM  
20 17,000 OR WHAT MIGHT BE PROBABLY 19,000 PAGES DOWN TO -- SAY  
21 WE GIVE OVER 75 PERCENT. BUT WE'VE GOT 5,000 PAGES WITH  
22 SUBSTITUTIONS. WE STILL HAVE TO GIVE THAT TO THE COURT. AND  
23 THE COURT HAS TO PASS ITEM BY ITEM ON EACH ONE; IS THIS AN  
24 ADEQUATE SUBSTITUTION.

25 "MR. HALPERN, YOU'RE ONLY SAYING HERE THAT IT WAS

1       SOMETIME IN THE FALL OF 2006. WHY CAN'T YOU GIVE THEM A DATE?  
2       WHAT ABOUT THIS PERSON'S NAME? THIS PERSON IS GOING TO BE A  
3       WITNESS."

4               BECAUSE IT'S INTEGRAL TO SAFEGUARD HIS RIGHTS. AND  
5       WHAT HE'S ASKING US TO DO NOW IS TO INVOLVE THE COURT IN  
6       PROTECTING HIS RIGHTS, WHEREAS ALWAYS -- AND THE CASES ARE  
7       QUITE SPECIFIC ON IT IN THE 9TH CIRCUIT AS WELL AS EVERY  
8       CIRCUIT. OUR OBLIGATION IS TO GIVE THIS MATERIAL TO  
9       MR. GERAGOS SO HE CAN DETERMINE WHAT IS CONSISTENT WITH HIS  
10      DEFENSE.

11             I DON'T EVEN KNOW HIS DEFENSE, AND YET I'M SUPPOSED  
12      TO DECIDE WHAT PIECES OF MATERIAL TO SUBSTITUTE AND HOW TO  
13      SUBSTITUTE THEM FOR THE COURT. I CAN'T ADVISE YOU  
14      APPROPRIATELY WITHOUT INPUT FROM MR. GERAGOS IN THIS PROCESS.  
15      AND BECAUSE OF THAT, THE ONLY CASES THAT HAVE GONE THIS  
16      ROUTE -- AND MOST RECENTLY THE CLAY DECISION, A 9TH CIRCUIT  
17      DECISION, DEALING WITH ONE SUBSTITUTION, WENT UP TO THE  
18      9TH CIRCUIT. THE GOVERNMENT ARGUED ONE WAY. THE 9TH CIRCUIT  
19      SAID THAT THE SUBSTITUTION FORCED BY THE COURT ON THE  
20      GOVERNMENT WAS APPROPRIATE.

21             SO THE COURT WINS AND THE DEFENDANT WINS, ALTHOUGH  
22      WITH THAT ONE SUBSTITUTION THE GOVERNMENT OBJECTED, I'M SURE  
23      IT DELAYED THE TRIAL SIX OR NINE MONTHS. THIS IS A WAY THAT  
24      IF WE DO TRY TO TAKE OUR FACTS, WE'RE REALLY TRYING TO DRIVE A  
25      SQUARE PEG THROUGH A ROUND HOLE IN SECTION 4, WHICH WAS

1 DESIGNED NOT TO RELIEVE THE BURDEN ON DEFENSE COUNSEL TO LOOK  
2 AT THIS AND NOT TO PLACE THE BURDEN ON THE COURT TO DETERMINE  
3 WHAT IS AN ACCURATE SUBSTITUTION WITHOUT ANY INFORMATION FROM  
4 DEFENSE COUNSEL, BUT TO ALLOW THE GOVERNMENT IN REALLY RARE  
5 CASES TO COME TO THE COURT AND SAY, "LOOK, WE DON'T WANT TO  
6 GIVE THIS TO THEM." THEN WE'RE GOING TO SECTION 4. "HERE'S  
7 OUR SUBSTITUTION. THIS IS SO CLASSIFIED, WE CAN'T EVEN GIVE  
8 IT TO THEM."

9 THAT'S THE PURPOSE OF SECTION 4, NOT TO ALLOW  
10 MR. GERAGOS TO HAVE US WINNOW AWAY WHAT WE THINK SHOULD BE  
11 BRADY OR SHOULDN'T BE BRADY. CLEARLY, YOUR HONOR, IT WOULD  
12 MAKE OUR ABILITY TO PROSECUTE THE CASE FAR MORE EASY. YOU  
13 DON'T OFTEN SEE GOVERNMENT PROSECUTORS ARGUING TO GIVE  
14 MATERIAL TO THE DEFENSE. I'D LIKE TO DO IT. I'D LIKE TO  
15 THINK WE'RE DOING IT FOR ONE REASON AND ONE REASON ALONE:  
16 BECAUSE IT'S APPROPRIATE.

17 BUT IN THAT FRAMEWORK -- I CAN'T HELP FORGET THAT --  
18 WHAT WE WANT HERE IS A FAIR TRIAL WITH A FAIR VERDICT THAT  
19 COULD BE UPHELD ON APPEAL. I DON'T WANT TO TRY TO URGE ON THE  
20 COURT A COURSE OF CONDUCT WHICH, AFTER WE HAVE GO THROUGH IT,  
21 IS GOING TO RESULT IN APPEALS EITHER INTERIM BY SECTION 78 OR,  
22 WORSE THAN THAT, IF WE DO GET A CONVICTION, TO HAVE THAT  
23 CONVICTION OVERTURNED. IT IS BECAUSE OF THAT THAT I CANNOT  
24 URGE A SECTION 4 PROCEEDING ON IT.

25 I THINK MR. GERAGOS NEEDS TO LOOK AT THIS

1 INFORMATION. AND I SEE REALLY NO WAY AROUND -- THE COURT  
2 REALLY WANTS TO UNDERGO A LONG TORTUROUS SECTION 4 --

3 THE COURT: NO, I DON'T WANT TO DO THAT. BUT YOU'VE  
4 TAKEN THE POSITION THAT AN ABSOLUTE PREREQUISITE IS THAT HE  
5 SUBMIT TO THIS BACKGROUND --

6 MR. HALPERN: WELL, THAT'S NOT MY POSITION, YOUR  
7 HONOR. IT WAS MY HOPE AND I WAS UNDER THE UNDERSTANDING,  
8 CERTAINLY, WHEN IT WAS SUGGESTED THAT THERE WERE WAYS  
9 CLEARANCE COULD BE DONE WITH -- USING MR. LONDERGAN AND THE  
10 COURT. WHAT'S IMPERATIVE IS THAT MR. LONDERGAN, WHO IS  
11 INDEPENDENT, CAN INFORM THE COURT THAT MR. GERAGOS IS AN  
12 APPROPRIATE INDIVIDUAL TO RECEIVE THIS INFORMATION. HE'S  
13 CONVINCED THAT WE CAN GIVE IT TO HIM WITHOUT RUNNING A RISK  
14 THAT WE OTHERWISE ARE NOT OBLIGATED TO RUN.

15 THAT'S ALL I'M SAYING. THAT HAS TO BE DONE. AND IF  
16 MR. LONDERGAN CAN'T DO IT, WE CERTAINLY CAN'T ALLOW  
17 MR. GERAGOS TO TAKE CLASSIFIED INFORMATION. BECAUSE WE GIVE  
18 IT TO MR. LONDERGAN, AND MR. LONDERGAN GIVES IT TO  
19 MR. GERAGOS.

20 THE COURT: THE CASE THAT YOU'VE CITED TO ME, JUDGE  
21 SAND'S OPINION, HE OPTS TO DO IT IN U.S.A. VERSUS BIN LADEN.  
22 BUT HE ALSO MAKES IT CLEAR THAT IT'S NOT ABSOLUTELY REQUIRED  
23 IN EVERY CASE THAT THAT BE DONE.

24 MR. GERAGOS: THIS IS THE ONE CASE WHERE MY  
25 CLIENT --

1 THE COURT: THERE'S ACTUALLY MORE THAN ONE. HE  
2 CITES TO CONTRARY AUTHORITY WHERE JUDGES HAVE SAID, "NO, I'M  
3 NOT GOING TO ORDER IT." AND THE CASES APPARENTLY HAVE GONE  
4 FORWARD.

5 MR. HALPERN: ALL OF THOSE CASES, YOUR HONOR --  
6 REALLY THE ONLY ONE THAT I SEE THAT'S REALLY ON POINT IS  
7 JOLIFF. AND IN THAT CASE, JOLIFF, ONCE AGAIN, WAS HAPPY  
8 SIMPLY HAVING THE GOVERNMENT PROSECUTOR GO TO THE COURT  
9 SECURITY OFFICER AND MAKE SURE IT WAS OKAY TO TURN OVER THE  
10 INFORMATION. IT MIGHT NOT HAVE BEEN HIGHLY CLASSIFIED.

11 THE COURT SECURITY OFFICER IN THAT CASE MIGHT HAVE  
12 SAID, "I SATISFIED MYSELF." MAYBE "I'VE LOOKED -- I'VE RUN  
13 SOME INDICES. THERE'S NO CRIMINAL RECORD. HE'S NOT  
14 DISBARRED." THAT'S FINE.

15 THE COURT: HE CAN'T EVEN DETERMINE CRIMINAL RECORD,  
16 THOUGH. MR. LONDERGAN TELLS ME THAT HE HAS NO ACCESS TO THESE  
17 DATABASES JUST BECAUSE HE'S DESIGNATED AS COURT SECURITY  
18 OFFICER. HE NECESSARILY HAS TO RELY ON LAW ENFORCEMENT. AND  
19 YOU AND I KNOW THAT ACCESS TO THOSE DATABASES NOW IS VERY  
20 CLOSELY REGULATED. YOU'VE GOT TO SIGN ON AND SIGN OFF.  
21 THERE'S A RECORD OF WHO WAS ON AND OFF AT THE VARIOUS TIMES.

22 MR. LONDERGAN, LET ME COME BACK TO YOU. IS THERE  
23 SOME WAY THAT WE CAN CHECK OUT MR. GERAGOS WITHOUT HIS  
24 COOPERATION WHERE YOU WOULD FEEL CONFIDENT TELLING THE COURT  
25 IT'S FINE TO HAVE THE GOVERNMENT TURN THIS INFORMATION OVER TO



1 HIM? CAN YOU THINK OF ANY ALTERNATIVE TO COMPELLING HIM TO  
2 COOPERATE?

3 MR. LONDERGAN: UNFORTUNATELY, YOUR HONOR, THERE IS  
4 NOTHING I'M AWARE OF.

5 THE COURT: IS THE NATURE OF THE INFORMATION OF  
6 WHICH YOU'RE AWARE IN THIS CASE SUCH THAT YOU WOULD SAY, "WE  
7 NEED TO HAVE THESE BACKGROUND CHECKS RUN"?

8 MR. LONDERGAN: ABSOLUTELY, POSITIVELY. THIS IS IT.

9 THE COURT: MR. GERAGOS, WE'RE BACK TO YOU.

10 MR. GERAGOS: WE'RE BACK TO THE SITUATION, JUDGE. I  
11 HAVE A CLIENT WHO NEVER OBTAINED A SECURITY CLEARANCE. I'M  
12 NOT IN MR. FOGGO OR MR. MAC DOUGALL'S SITUATION. I UNDERSTAND  
13 IF I WAS REPRESENTING MR. FOGGO, OBVIOUSLY, WHEN I UNDERTAKE  
14 TO REPRESENT SOMEBODY WHO WAS THE DEPUTY DIRECTOR IN CHARGE OF  
15 THE DAILY OPERATIONS OF THE CIA, I'D HAVE TO BE CLUELESS NOT  
16 TO DO IT.

17 THE COURT: HOLD ON ONE SECOND. TRUST ME FOR A  
18 SECOND. BECAUSE, AS I TOLD YOU, THEY CAME DOWN AND MADE AN  
19 EX PARTE PRESENTATION TO GIVE ME SOME CONTEXT. I UNDERSTAND  
20 THE DISTINCTION BETWEEN WHAT MR. WILKES HAS DONE FOR A LIVING  
21 UP TO THIS POINT AND WHAT MR. FOGGO HAS DONE. I GET THAT.  
22 BUT WHAT I'M TELLING YOU IS BASED ON WHAT I WAS SHOWN IN  
23 CONTEXT, THERE'S SOME INFORMATION THAT MR. WILKES OUGHT TO  
24 KNOW THAT I DON'T THINK HE KNOWS. I DON'T.

25 MR. GERAGOS: THEN THEY OUGHT TO TURN IT OVER.

1 THE COURT: THEY CAN'T.

2 MR. GERAGOS: YES, THEY CAN. I'M TELLING YOU THAT I  
3 THINK THEY CAN. I THINK THIS IS NOTHING MORE THAN A BACK-DOOR  
4 WAY FOR THEM TO MANAGE THE INFORMATION. I DON'T BUY THAT.  
5 THEY CAN TURN IT OVER. IF THEY CAN'T TURN IT OVER, THEY KNOW  
6 WHAT THEIR OPTIONS ARE. THEY OBVIOUSLY HAD INFORMATION TO GO  
7 TO THE GRAND JURY TO GET AN INDICTMENT. SO THEY HAD TO PUT  
8 SOMETHING IN FRONT OF THE GRAND JURY.

9 THEY ALSO, UNDER CIPA, HAVE TO HAVE THE ABILITY TO  
10 PUT STUFF IN FRONT OF A PETIT JURY. SO IF THEY'VE GOT THAT  
11 INFORMATION, TURN IT OVER AND LET ME SEE IT, WHICH THEY  
12 HAVEN'T DONE. IF THEY'VE GOT EXCULPATORY THAT THE COURT  
13 THINKS I OUGHT TO SEE, THEN TURN IT OVER SO I CAN SEE IT. BUT  
14 I DON'T HAVE TO GO THROUGH -- JUMP THROUGH HOOPS ADMINISTERED  
15 BY THE DEPARTMENT OF JUSTICE OF THE FBI OR ANY OF THE OTHER  
16 ALPHABET SOUPS ADMINISTERED UNDER THE HOMELAND SECURITY IN  
17 ORDER TO GET THE INFORMATION TO DEFEND A CLIENT WHO'S HERE IN  
18 A COURTROOM.

19 I JUST GOT BACK FROM MOLDAVIA. FOR A MINUTE HERE, I  
20 BLINKED MY EYES AND THOUGHT I WAS IN MOLDAVIA LISTENING TO THE  
21 GOVERNMENT TELL ME THAT I'VE GOT TO UNDERGO SOME KIND OF  
22 RIGOROUS OR ONEROUS BACKGROUND CHECK.

23 THE COURT: IT'S REALLY NOT LIKE THAT. I'VE BEEN  
24 THROUGH A BUNCH OF THEM, AND THEY'RE NOT THAT RIGOROUS.

25 MR. GERAGOS: IN PRINCIPLE, I DON'T THINK THAT A

1       LAWYER IN CALIFORNIA WHEN HE'S DEFENDING A CLIENT SHOULD HAVE  
2       TO GO THROUGH A BACKGROUND CHECK TO GET DISCOVERY.

3               MR. HALPERN:   HE DOESN'T.   THAT'S THE BOTTOM LINE ON  
4       ALL OF THIS.   HE DOES NOT.   NOBODY IS FORCING HIM TO BE HERE.  
5       WE WANT HIM TO BE HERE.   WE'RE NOT LOOKING FOR ANOTHER CLIENT  
6       {SIC}.

7               BUT I HAVE TO SAY, YOUR HONOR, THE FACT IS WHEN  
8       PEOPLE LOOK AT THIS CASE, THEY'RE GOING TO BE ABLE TO TAKE  
9       THIS TRANSCRIPT AND SEE THAT THIS IS THE PERFECT DEFINITION OF  
10      BRADY.   I'M NOT IMPUTING BAD FAITH.   AGAIN, PLEASE,  
11      MR. GERAGOS SHOULD UNDERSTAND THAT.   HE'S TAKING A PRINCIPLE  
12      POSITION.   I'M NOT SAYING HE'S DOING THIS FOR A NEFARIOUS  
13      MOTIVE.

14              BUT THE FACT IS HE IS ATTEMPTING TO GET THE  
15      GOVERNMENT TO GIVE HIM CLASSIFIED INFORMATION IN A MANNER  
16      OUTSIDE OF CIPA TO FORCE OUR HAND.   WE CAN'T DO IT.   AND THE  
17      HARDER HE POUNDS THE TABLE, ALTHOUGH I MUST SAY TO THE EXTENT  
18      HE'S WILLING TO HORSE TRADE, I THINK HE UNDERCUTS HIS  
19      PRINCIPLES.   BUT THAT ASIDE --

20              THE COURT:   I'M NOT WILLING TO HORSE TRADE.

21              MR. HALPERN:   SO THE POINT IS THE HARDER HE POUNDS  
22      THE TABLE AND STANDS ON HIS PRINCIPLES, THE MORE HE'S SIMPLY  
23      MAKING CLEAR THAT HE WANTS THE GOVERNMENT TO TURN OVER WHAT IS  
24      HIGHLY CLASSIFIED INFORMATION IN A MANNER THAT, AGAIN -- IT'S  
25      NOT GOING TO HARM HIM.   HE JUST WANTS IT REVEALED.   HE WANTS

1 TO PUT US IN THE POSITION OF SAYING, "THAT'S IT. WE THROW UP  
2 OUT HANDS. WE'RE GIVING UP." AND BEFORE CIPA, WE WOULD HAVE  
3 HAD TO GIVE UP.

4 BUT NOW WE DON'T. WE HAVE AN APPROVAL PROCEDURE.  
5 AND IT'S HIS CHOICE, REALLY, IF HE WANTS TO LIVE WITH IT. THE  
6 GOVERNMENT HAS NO CHOICE.

7 THE COURT: I DON'T HAVE AN ALTERNATIVE HERE TO  
8 APPOINT SECOND COUNSEL OR ASK MR. GERAGOS TO DESIGNATE ONE OF  
9 HIS ASSOCIATES AS THE CIPA CONTACT PERSON WHO WOULD UNDERGO  
10 THE -- I'M NOT SURE HE WILL. I DON'T HAVE THAT --

11 MR. GERAGOS: I CAN SAY I WOULD NOT. NOBODY THAT'S  
12 WORKING FOR ME IS GOING TO UNDERGO IT.

13 THE COURT: I DON'T KNOW THAT THAT WOULD GET US  
14 ANYWHERE ANYWAY BECAUSE ULTIMATELY, YOU'D HAVE TO KNOW THE  
15 INFORMATION. AND TO GET THE INFORMATION, THEY WANT YOU TO GO  
16 THROUGH THIS CLEARANCE.

17 MR. HALPERN: WHAT'S UNFORTUNATE -- I WISH, YOUR  
18 HONOR -- BECAUSE AGAIN, I'M MAKING THIS STATEMENT AS A MARK OF  
19 GOOD FAITH IN THAT WE DON'T WANT TO CROSS MR. WILKES'S RIGHT  
20 TO COUNSEL OF CHOICE. WE DON'T. I WOULD BE WILLING EVEN TO  
21 HAVE AN EXPEDITED APPEAL. I THOUGHT PERHAPS A MANDAMUS MIGHT  
22 BE APPROPRIATE. I LOOKED INTO THE LAW. AND CLEARLY, HE HAS  
23 NO RIGHT TO MANDAMUS. IF THE COURT WAS TO REMOVE HIM BECAUSE  
24 HE WOULDN'T, THERE IS NO RIGHT OF MANDAMUS. HOWEVER, IF THE  
25 GOVERNMENT DOESN'T OBJECT TO IT AND THE COURT INDICATES IT

1 MIGHT WISH IT, PERHAPS THE 9TH CIRCUIT WOULD HEAR IT.

2 THE COURT: WHY WOULDN'T THERE BE A RIGHT OF  
3 MANDAMUS? IF I REMOVE MR. GERAGOS, HOW CAN MR. WILKES EVER  
4 HAVE THAT AIRED AND SAY -- DOES HE HAVE TO WAIT UNTIL HE'S  
5 MAYBE CONVICTED?

6 MR. HALPERN: THAT WAS EXACTLY MY POSITION.

7 MR. GERAGOS: WHY CAN'T THEY JUST APPEAL WHEN YOU  
8 DENIED THEIR MOTION?

9 MR. HALPERN: UNFORTUNATELY, THERE IS -- WELL, THAT  
10 IS A POSSIBILITY.

11 MR. GERAGOS: WHY DON'T YOU JUST DENY THEIR MOTION  
12 AND LET THEM APPEAL?

13 MR. HALPERN: THERE ARE TWO WAYS TO DO THIS, YOUR  
14 HONOR: THE GOVERNMENT IS NOT GOING TO TURN THIS OVER. WE  
15 BELIEVE THE CASE LAW IS SQUARELY ON OUR SIDE.

16 MR. GERAGOS: LET'S LET THE 9TH CIRCUIT RULE.

17 MR. HALPERN: I WOULD INVITE THE COURT TO --

18 THE COURT: DO YOU KNOW HOW MANY WRITS I HAVE UP  
19 THERE RIGHT NOW?

20 MR. GERAGOS: THEN WHAT'S ONE MORE?

21 MR. HALPERN: THAT'S THE ONLY PROBLEM WITH IT. I'M  
22 NOT GOING TO INVITE THE COURT, AS AN OFFICER OF THE COURT, TO  
23 TAKE A POSITION THAT I THINK WILL BE REVERSED. ALTHOUGH I  
24 HAVE NO PROBLEM. IF THE COURT WANTS TO DO IT THAT WAY, THAT'S  
25 FINE. IF THE GOVERNMENT'S WRONG, WE TURN IT OVER.

1 BUT I DO THINK THE CASE LAW IS FAIRLY STRONG. I  
2 DIDN'T FIND TWO CASES. I FOUND ONE CASE GOING THE OTHER WAY.  
3 BUT, AS I SAID, THE ONLY REASON THE CASE WENT THE OTHER WAY IS  
4 THE BECAUSE THE GOVERNMENT DIDN'T OBJECT. THE GOVERNMENT  
5 WASN'T PUSHING THAT ISSUE. SO IT WAS CLEARLY DICTA IN THE  
6 JOLIFF CASE.

7 I DO THINK THAT IF THE COURT WANTED TO SEEK  
8 MANDAMUS, IT WOULD BE -- HAVE MR. GERAGOS SEEK MANDAMUS, IT'S  
9 REASONABLE. BUT I HAVE TO TELL YOU IT'S DISCRETIONARY. IT'S  
10 A SUPREME COURT CASE, WHICH I CAN GIVE THE COURT, DIRECTLY ON  
11 POINT WHICH SAYS THE WAY TO VINDICATE THE RIGHT TO HAVE  
12 COUNSEL REMOVED, HAVE NEW COUNSEL COME IN, AND IF THERE'S A  
13 GUILTY VERDICT, THEN THEY CAN EXAMINE THE ISSUE.

14 THE COURT: WHAT DO YOU MEAN THAT ITS DISCRETIONARY?  
15 THEY MIGHT TAKE IT?

16 MR. HALPERN: THE 9TH CIRCUIT ALWAYS HAS THE RIGHT  
17 TO TAKE MANDAMUS IF THEY DESIRE TO TAKE IT. BUT THEY MIGHT  
18 FIND IT'S NOT MANDATORY. IT'S OUTSIDE THEIR DISCRETION. SO  
19 THAT ALSO PUTS THE COURT IN A DIFFICULT POSITION. I'M NOT  
20 GOING TO TRY TO INTERPRET WHETHER THE 9TH CIRCUIT WOULD TAKE A  
21 DISCRETIONARY MANDAMUS EVEN WITH THE COURT URGING IT AND THE  
22 GOVERNMENT SAYING IT DIDN'T OBJECT. BUT THOSE ARE THE ONLY  
23 TWO POSSIBILITIES, YOUR HONOR, THAT WE SEE AT THIS POINT.

24 THE COURT: MR. GERAGOS, ANYTHING MORE?

25 MR. GERAGOS: NO. I SUBMIT IT.

1 THE COURT: WE READ THE WHEAT CASE. IN THE PAST, I  
2 THOUGHT AND I CONTINUE TO THINK THAT THERE'S SOME DISTINCTIONS  
3 BETWEEN THE SITUATION WHICH THE COURT IS PRESENTED HERE AND  
4 WHAT WE SPEAK TO. WHEAT INVOLVES A HOST OF CONFLICTS WITH A  
5 LAWYER ATTEMPTING TO REPRESENT CO-DEFENDANTS ON A CASE AND  
6 WHERE THE LAWYER WOULD NECESSARILY HAVE TO REFRAIN FROM  
7 CROSS-EXAMINING WHAT WERE REPRESENTED AS PROSPECTIVE WITNESSES  
8 BECAUSE HE'D BEEN IN A LAWYER-CLIENT RELATIONSHIP WITH THOSE  
9 WITNESSES BEFORE.

10 I REMEMBER THIS CASE WHEN IT HAPPENED. I WAS HERE.  
11 JUDGE IRVING REMOVED MR. IREDALE FINDING THAT IT WOULD PUT THE  
12 DEFENDANT THAT HE WAS REPRESENTING IN A REAL BIND BECAUSE HE  
13 HAD HIS HANDS TIED BEHIND HIS BACK. HIS ETHICAL  
14 RESPONSIBILITIES AS AN ATTORNEY TO THE FORMER CLIENTS WOULD  
15 PREVENT HIM FROM REVEALING ANYTHING HE LEARNED IN THE COURSE  
16 OF PRESENTING THEM. AND JUDGE IRVING BELIEVED THAT THAT WOULD  
17 IMPAIR HIS REPRESENTATION OF MR. WHEAT, THE CURRENT CLIENT.

18 SO THERE ARE DIFFERENCES HERE. YOU'RE NOT  
19 CONFLICTED IN THAT RESPECT, MR. GERAGOS. BUT THE EFFECT OF  
20 THIS, I THINK, PUTS YOU IN A CONFLICT SITUATION THAT IS  
21 SOMEWHAT AKIN TO THAT. AS I SAID, IT'S NOT JUST SPECULATION  
22 ON MY PART AT THIS POINT BECAUSE I'VE BEEN SHOWN SOME OF THE  
23 ACTUAL DOCUMENTATION. AT FIRST WHEN WE HAD OUR HEARING, I  
24 THOUGHT "WELL, YOU KNOW, YOU REPRESENT TO ME THAT YOU KNOW THE  
25 INFORMATION." MR. WILKES, HE'S THE OBJECT OF ATTENTION HERE.

1 HE WAS INVOLVED IN THE FIRSTHAND DEALINGS. HE'S PRESUMABLY  
2 TOLD YOU. YOU'VE INTERVIEWED HIM ABOUT THE CASE.

3 SO I KNOW -- I ACCEPT THAT YOU BELIEVE YOU KNOW WHAT  
4 THE INFORMATION IS AND THAT NOTHING'S GOING TO COME AS A  
5 SURPRISE. I'VE ALSO CONSIDERED THE POSSIBILITY THAT YOU COULD  
6 DRIFT IN THE TAILWIND OF MR. FOGGO ON THE CASE AND LET HIS  
7 LAWYERS GO FIRST. AND YOU'RE A VERY SHARP GUY. YOU CAN  
8 PROBABLY PICK UP THE GIST OF THINGS SO THAT MR. WILKES  
9 WOULDN'T BE PREJUDICED BY NOT HAVING THE INFORMATION. THAT  
10 ALSO INFORMED MY THINKING AT ONE POINT.

11 THEN THE GOVERNMENT CAME AND PRESENTED ME SOME OF  
12 THE INFORMATION, JUST TO GIVE ME SOME CONTEXT. IT WAS  
13 INTERESTING. ONE OF THE CASES THAT I READ ON CIPA WHERE A  
14 DISTRICT JUDGE MADE A DECISION THIS COULDN'T POSSIBLY AFFECT  
15 THE GOVERNMENT'S NATIONAL SECURITY INTERESTS, THE COURT OF  
16 APPEALS SAID, "AH, AH, AH, AH. NOT SO QUICKLY. WHAT A  
17 DISTRICT JUDGE THINKS IS NOT GOING TO AFFECT SECURITY INTEREST  
18 IS NOT THE MOST INFORMED POSITION. THE SECURITY PEOPLE ARE IN  
19 THE BEST POSITION TO KNOW THAT."

20 AND SO, TOO, IT WAS HERE. I THOUGHT "WELL, ALL  
21 RIGHT. I'VE GOT AN EXPERIENCED LAWYER WHO'S THOROUGHLY  
22 INTERVIEWED HIS CLIENT. HIS CLIENT THINKS HE KNOWS WHAT  
23 THEY'RE TALKING ABOUT." I KNOW WE'RE ALL TALKING IN VERY  
24 GENERIC TERMS HERE. "AND HE'S PREPARED TO GO FORWARD. AND  
25 I'VE EXPLAINED IT TO THIS SOPHISTICATED CLIENT THAT THE EFFECT



1 OF THIS IS 'YOU DON'T GET CERTAIN DISCOVERY THAT YOU'RE  
2 ENTITLED TO.'

3 NOW, AT THE TIME, AS I SAID, I THOUGHT -- AND THIS  
4 WAS SIMPLISTIC I SEE NOW IN RETROSPECT. BUT I THOUGHT "OKAY.  
5 THEY HAVE AN OBLIGATION UNDER THE CONSTITUTION TO GIVE YOU  
6 EXCULPATORY AND IMPEACHMENT MATERIAL. AND SO DISCHARGE THAT  
7 OBLIGATION. AND IF MR. WILKES, KNOWING THE CONSEQUENCES, THAT  
8 HE'S NOT GOING TO GET THE INCULPATORY MATERIAL, WANTS TO FACE  
9 THAT, HE'S GOT A RIGHT." I'M BUFFETED, OF COURSE, BY THE FACT  
10 THAT HE'S GOT A RIGHT TO COUNSEL OF HIS CHOICE. AND THERE'S A  
11 STRONG PRESUMPTION THAT HE OUGHT TO BE ABLE TO HAVE YOU AS HIS  
12 COUNSEL.

13 BUT NOW HAVING LOOKED AT THE INFORMATION, HAVING  
14 CONSIDERED THE ARGUMENTS, I JUST DON'T SEE A WAY THAT THIS CAN  
15 WORK. THE GOVERNMENT WOULD HAVE TO GO OVER ALL THESE PAGES,  
16 WHICH, IN THE FIRST INSTANCE, OUGHT TO BE YOUR RESPONSIBILITY.  
17 AND THEN THE ISSUE OUGHT TO BE JOINED AND PRESENTED TO ME AS  
18 TO HOW THIS CAN BE PRESENTED. I NEED THE BENEFIT OF YOUR  
19 INPUT AS TO WHY SOME OF THIS MIGHT BE EXCULPATORY THAT WOULD  
20 ESCAPE THE GOVERNMENT'S ATTENTION AND MY OWN. AND I WON'T  
21 HAVE THAT IF YOU DON'T SUBMIT TO THIS CLEARANCE. I WON'T HAVE  
22 THAT.

23 I CAN'T IMAGINE DELAYING THIS WILKES/FOGGO CASE FOR  
24 SIX MONTHS. AS YOU KNOW, BECAUSE YOU'VE BEEN HERE ALL  
25 AFTERNOON, THIS IS A VERY BUSY DISTRICT; I DARE SAY BUSIER

1 THAN LOS ANGELES WITH ALL THE JUDGES THEY HAVE THERE OR  
2 MOLDAVIA OR ANY OF THE OTHER PLACES THAT YOU'VE BEEN. WE'RE  
3 VERY BUSY HERE. AND YOU HEARD ME SETTING TRIAL DATES LIKE  
4 THIS.

5 THE IDEA THAT I COULD SIT DOWN FOR HOURS AND HOURS  
6 AND HOURS WITH THE GOVERNMENT AND GO OVER THIS AND HASSLE  
7 MR. FORGE AND MR. HALPERN SAYING "BE A LITTLE MORE  
8 FORTHCOMING. I THINK MR. GERAGOS NEEDS A LITTLE BIT MORE,"  
9 IT'S NOT THAT I'M NOT WILLING TO DO THAT OR UP TO THE TASK. I  
10 DON'T HAVE THE TIME TO DO THAT. I'M NOT SURE I'D BE VERY GOOD  
11 AT IT BECAUSE I DON'T KNOW EXACTLY THE PARAMETERS OF  
12 MR. WILKES'S DEFENSE.

13 WHEAT DOES POINT OUT THAT IF I HAVE A CONCERN ABOUT  
14 THE REPRESENTATION OF COUNSEL -- AND HERE, LET ME BE VERY,  
15 VERY CLEAR. YOU'RE A FINE, FINE LAWYER WITH A DISTINGUISHED  
16 REPUTATION. I CAN'T IMAGINE BEING REPRESENTED BY A MORE  
17 QUALIFIED PERSON WERE I MR. WILKES. BUT THE EFFECT OF THIS  
18 IS -- THE EFFECT OF YOUR REFUSAL TO GO THROUGH THIS PROCEDURE,  
19 PRINCIPLE -- AND I ACKNOWLEDGE THAT, PRINCIPLE -- IS THAT IT  
20 HAMPERS YOU. IT HAMPERS YOU IN YOUR REPRESENTATION OF HIM,  
21 AND IT IMPOSES WHAT I REGARD AS AN UNDUE BURDEN ON THE COURT  
22 AND THE PROSECUTORS TO IDENTIFY INFORMATION THAT MIGHT BE  
23 EXCULPATORY AND THEN TO SANITIZE THAT IN A WAY THAT WOULD BE  
24 USEFUL TO YOU. WITHOUT YOUR INPUT, I CAN'T IMAGINE HOW I  
25 WOULD DO THAT.

1           AND IT PUTS ME, AS YOU CAN IMAGINE, IN A POSITION OF  
2 NOT BEING A NEUTRAL FACT-FINDER ANYMORE, BUT BEING AN ADVOCATE  
3 FOR MR. WILKES IN SAYING, "YOU NEED MORE, MR. HALPERN. YOU  
4 NEED TO PUT MORE IN THESE SUMMARIES."

5           MR. GERAGOS: ONLY IF YOU BUY INTO THEIR ARGUMENT  
6 THAT BRADY HAS SOMEHOW AND GIGLIO HAS BEEN REPEALED BY CIPA.

7           THE COURT: THEY HAVE AN OBLIGATION -- THEY'VE MADE  
8 THIS DISTINCTION, WHICH I ACCEPT: THEY HAVE AN OBLIGATION TO  
9 TURN THAT OVER TO YOU. THAT'S NOT IN QUESTION HERE. AND I  
10 FIND THAT EVEN IF I WERE TO APPROVE YOUR CONTINUED  
11 REPRESENTATION OF MR. WILKES AND IMPOSE THIS ON THEM, THEN  
12 WE'D HAVE TO GO THROUGH THIS VERY ONEROUS PROCEDURE THAT  
13 MR. HALPERN OUTLINED, THIS HOST OF HORRIBLES, WHICH I CAN'T  
14 DO. I JUST CAN'T.

15           IF THE 9TH CIRCUIT WANTS TO SEND A JUDGE DOWN AND  
16 LET HIM TAKE LEAVE OF HIS APPELLATE DUTIES TO DO THIS FOR A  
17 COUPLE OF MONTHS, THEN GREAT. WE'LL POSTPONE THE WILKES/FOGGO  
18 CASE SO THAT THAT CAN BE DONE. I CAN'T. I'M NOT SURE ANY  
19 JUDGE CAN WITHOUT INPUT FROM YOU AS TO EXACTLY WHAT'S  
20 EXCULPATORY.

21           SO THAT'S THE PROBLEM THAT I HAVE. THEY CERTAINLY  
22 HAVE THE OBLIGATION TO TURN IT OVER TO YOU. BUT THIS  
23 REGULATION, THIS CIPA, REGULATES THE MANNER IN WHICH IT'S  
24 TURNED OVER TO YOU. IT'S A GIVEN THAT IT HAS TO BE TURNED  
25 OVER. IT'S JUST A QUESTION ABOUT THE MANNER.

1           NOW, IN THE FIRST INSTANCE, IF YOU SUBMIT TO THIS  
2           PROCEDURE, YOU'LL BE ABLE TO SEE THIS RAW DATA AND TO BE ABLE  
3           TO ARGUE THE APPROPRIATE MANNER OF PRODUCTION. AND REALLY, IN  
4           THE FIRST INSTANCE, MR. GERAGOS, THAT'S YOUR TASK AS HIS  
5           LAWYER; TO ADVOCATE FOR HIM ON WHAT'S EXCULPATORY AND WHAT THE  
6           LIMITATIONS --

7           MR. GERAGOS: IT'S THEIR TASK TO TURN IT OVER. IT'S  
8           NOT MY TASK TO JUMP THROUGH HOOPS. THAT'S THE DIFFERENCE. I  
9           UNDERSTAND WHAT THE COURT IS SAYING. I'M NOT HERE TO TRY TO  
10          BURDEN THE COURT WITH ANY ADDITIONAL DUTIES OR INFORMATION OR  
11          ANYTHING ELSE. BUT THE FACT IS THAT AS I SIT HERE THIS  
12          AFTERNOON, IT'S ALMOST LIKE WE'RE IN THE TWILIGHT ZONE.

13          THE COURT: I KNOW.

14          MR. GERAGOS: SECRET STAR CHAMBER PROCEEDINGS THAT I  
15          DON'T KNOW ABOUT. THEY GO TO THE JUDGE. THE JUDGE TELLS ME  
16          "I THINK YOU OUGHT TO GET THE SECRET HANDSHAKE." AND THEN AT  
17          THE SAME TIME, THEY ARE LEAKING INFORMATION ON RULE 60. AND I  
18          CAN'T HAVE A HEARING. WE HAVE TO WAIT UNTIL HE'S CONVICTED,  
19          AND AFTERWARDS WE CAN TALK ABOUT IT. IT'S REALLY A BIZARRE  
20          SITUATION.

21          THE COURT: HOLD ON A SECOND.

22          MR. HALPERN: MR. GERAGOS MAY HAVE THE WRONG IDEA.  
23          WE DID -- WE GAVE CERTAIN EXHIBITS TO THE COURT. WE ALERTED  
24          SPECIFICALLY IN OUR BRIEF WE WERE GOING TO DO THAT FOR THIS  
25          EXACT PURPOSE. SO THIS WAS NOT DONE BEHIND ANYBODY'S BACK.

1 THE COURT: I'M SURE YOU MISSPOKE. BUT THE IDEA OF  
2 ME BEING INVOLVED IN SOME KIND OF STAR CHAMBER AND -- I  
3 WOULDN'T HAVE INVOLVED MYSELF IN THAT, MR. GERAGOS. I REALLY  
4 WOULDN'T.

5 MR. GERAGOS: I UNDERSTAND, BUT I STILL --  
6 THERE'S -- THE IDEA OF DOING THESE TWO PROCEEDINGS BOOK-ENDED  
7 IN THE SAME HEARING AND THAT SOMEHOW MY CLIENT CAN BE FORCED  
8 TO LOSE HIS LAWYER AT THE SAME TIME THAT THE GOVERNMENT CAN  
9 VIOLATE THE LAW -- AND WE KNOW THEY'VE DONE IT -- AND THERE'S  
10 NO REMEDY FOR THAT, THAT HE'S GOT TO LOSE HIS LAWYER  
11 PRE-TRIAL, THAT'S SOMETHING THAT JUST -- I'M NOT GOING ALONG  
12 WITH IT. I WON'T BE A PARTY TO IT.

13 THE COURT: I DON'T LIKE THE EFFECT OF THIS EITHER.  
14 IT RUBS AGAINST MY GRAIN. BUT THERE ARE A NUMBER OF IMPORTANT  
15 CONSIDERATIONS HERE. THERE IS NO QUESTION IN MY MIND, HAVING  
16 SEEN THE EXCERPTS THAT THEY'VE SHOWN ME, THAT THEY'RE NOT  
17 RESORTING TO THIS CLASSIFICATION TITLE IN A REACTIONARY WAY.  
18 THE INFORMATION TRULY IS CLASSIFIED, AND IT OUGHT NOT TO BE  
19 DISSEMINATED. AND I'M SURE AT SUCH POINT YOU HAVE ACCESS TO  
20 IT, YOU'LL UNDERSTAND WHY IT'S BEEN GIVEN THAT DESIGNATION.

21 AS I SAID, THE CONTEXT WAS VERY IMPORTANT FOR ME  
22 SEEING THIS THING, I THINK, IN THE CORRECT LIGHT. BUT NOW  
23 THAT I'VE DONE THAT, I HONESTLY THINK THAT YOU NEED TO  
24 COOPERATE WITH THIS INVESTIGATION, LAY THE PRINCIPLE ASIDE FOR  
25 PURPOSES OF REPRESENTING MR. WILKES ON THIS CASE. I'M HAPPY

1 TO HAVE YOU ON THIS FOGGO CASE WITH MR. WILKES. I REALLY AM.  
2 BUT I DON'T SEE ANY WAY AROUND IT, MR. GERAGOS. I  
3 DON'T SEE HOW YOU CAN CONTINUE WITHOUT ACCESS TO THE  
4 INFORMATION. YOU'RE ENTITLED TO IT, BUT IT'S JUST THE MANNER  
5 IN WHICH IT'S TURNED OVER TO YOU. AND THAT'S NOT A DIFFICULT  
6 PRINCIPLE. THE JENCKS ACT IN SOME DISTRICTS IS INVOKED ALL  
7 THE TIME. YOU'RE ENTITLED TO IT, BUT IT'S JUST A QUESTION OF  
8 THE MANNER AND THE TIMING.

9 MR. GERAGOS: I GET IT, AND I DON'T HAVE TO DO  
10 ANYTHING. AND THE PROBLEM IS IF MORE LAWYERS HAD JUST STOOD  
11 UP AND SAID "I'M NOT GOING TO GO ALONG WITH THIS, AND I'M NOT  
12 GOING TO DO IT, AND I'M NOT GOING TO DO IT FOR A GUY WHO  
13 DOESN'T HAVE A SECURITY CLEARANCE," FRANKLY WE WOULD BRING  
14 THIS TO A HALT.

15 I'M TELLING YOU I'M NOT GOING TO DO IT. AND I WILL  
16 ALSO TELL THE COURT I'M JOINTLY REPRESENTING HIM, GLOBALLY  
17 REPRESENTING HIM. IF I'M OFF OF FOGGO, I'M OFF OF THE OTHER  
18 CASE AS WELL.

19 THE COURT: THAT'S ACTUALLY FOR ME TO DECIDE.  
20 THERE'S NO IMPLICATION OF CLASSIFIED INFORMATION IN THE OTHER  
21 CASE. SO NO, I WOULD NOT RELIEVE YOU. YOU'VE MADE A GENERAL  
22 APPEARANCE. I'VE COUNTED ON THAT. I'VE SET A TRIAL DATE IN  
23 THAT CASE. YOU'RE NOT GOING TO BE RELIEVED ON THAT. WHATEVER  
24 YOUR ARRANGEMENTS ARE WITH MR. WILKES, THAT'S BETWEEN YOU AND  
25 HIM. BUT THIS ISSUE AFFECTS ONLY YOUR REPRESENTATION OF HIM

1 ON THE WILKES/FOGGO CASE.

2 LOOK, AGAIN, I WANT TO MAKE ONE MORE RUN AT THIS  
3 WITH YOU. I WOULD NOT HAVE THE GOVERNMENT INVOLVED IN ANY  
4 ASPECT OF THIS. IT WOULD BE BETWEEN YOU AND ME AND  
5 MR. LONDERGAN. AND I FULLY SUSPECT WITHIN --

6 WHAT'S THE PERIOD OF TIME, THE QUICKEST THAT THIS  
7 COULD BE DONE, MR. LONDERGAN?

8 I JUST WANT YOU TO KNOW THE INFORMATION WHETHER OR  
9 NOT YOU CHANGE YOUR POSITION OR NOT, MR. GERAGOS.

10 WHAT'S THE QUICKEST WE COULD DO THIS IF WE ASKED FOR  
11 IT TO BE DONE EXPEDITED?

12 MR. LONDERGAN: AFTER RECEIVING THE SATISFACTORILY  
13 COMPLETED FORMS, ON AN INTERIM BASIS TO AWARD THE CLEARANCES  
14 INITIALLY, IT WOULD BE 45 DAYS.

15 THE COURT: WOULD THEY PUT THIS TO THE TOP OF THE  
16 LIST IF I TOLD THEM I WANTED IT ON THE TOP OF THE LIST? I  
17 UNDERSTAND I'M NO MORE IMPORTANT AND THAT THERE'S OTHER  
18 WAITING CASES GOING ON. THIS, AFTER ALL, IS A MOTION FOR  
19 RECONSIDERATION. I'VE CHANGED MY POSITION ON THIS. THAT'S MY  
20 BAD. BUT I'D ASK THEM TO TAKE THAT INTO CONSIDERATION SO THAT  
21 HE COULD GET ACCESS TO THIS IN TIME TO USE IT AND BE PREPARED.

22 MR. LONDERGAN: YOUR HONOR, WE'D ASK FOR PRIORITY IN  
23 TERMS OF HANDLING. AND AS LONG AS THERE WEREN'T ANY GLITCHES  
24 THAT AROSE IN TERMS OF INFORMATION OBTAINED DURING THE  
25 INVESTIGATION, FOR EXAMPLE, THE FOGGO PORTION OF THE

1 LITIGATION, CLEARANCES HAVE BEEN AWARDED IN A VERY RAPID WAY.

2 THE COURT: MR. GERAGOS, THE ASSURANCE I CAN GIVE  
3 YOU IS THAT THIS WOULD BE BETWEEN YOU AND ME AND THE COURT  
4 SECURITY OFFICER, WHO'S NOT AN ARM OF THE GOVERNMENT. I THINK  
5 I CLARIFIED THAT AT ONE OF THE FIRST HEARINGS. HE REPORTS TO  
6 ME. HE DOESN'T REPORT TO THEM. NONE OF THE INFORMATION WOULD  
7 BE DISSEMINATED TO THEM. THEY WOULD HAVE NO SAY WHATEVER ON  
8 WHETHER YOU REMAIN ON THE CASE OR NOT PENDING THE RESULTS OF  
9 THAT. I HAVE EVERY REASON TO SUSPECT THAT IT WILL COME BACK  
10 SAYING, "NO PROBLEM." AND ALL OF THIS EXERCISE WOULD HAVE  
11 BEEN AN ACADEMIC, THEORETICAL EXERCISE.

12 NOW, I DON'T SAY THAT TO UNDERCUT THE PRINCIPLE THAT  
13 YOU'RE DEFENDING HERE. I UNDERSTAND THAT. BUT I'D ASK YOU TO  
14 RECONSIDER WITH THAT UNDERSTANDING. IT'S BETWEEN YOU AND ME  
15 AND MR. LONDERGAN AND WOULDN'T GO ANY FURTHER.

16 THE SPECTER THAT YOU'VE RAISED OF THE GOVERNMENT  
17 TRYING TO CONTROL WHO REPRESENTS MR. WILKES, I'M INDEPENDENT  
18 OF THEM. I WORK FOR THE SAME U.S. GOVERNMENT, BUT A VERY  
19 DIFFERENT BRANCH. I'M INDEPENDENT. I'VE SHOWN MY  
20 INDEPENDENCE. AND THAT'S WHY I'VE GOT THREE WRITS PENDING  
21 AGAINST ME RIGHT NOW, TWO BY THE UNITED STATES. TWO BY THE  
22 UNITED STATES BECAUSE I REFUSED TO GO ALONG WITH SOME OF THE  
23 STUFF THAT I THINK IS WRONG AND THEY'RE TRYING TO KEEP SECRET.  
24 WE'LL LEAVE THAT FOR ANOTHER DAY.

25 SO I TELL YOU THAT IN THE HOPE THAT I CAN MAYBE



1 IMPRESS UPON YOU THAT I'M NOT AN ARM OF THE PROSECUTION AT ALL  
2 HERE. I'M GOING TO LOOK AT THIS FAIRLY JUST IN TERMS OF  
3 CLASSIFIED INFORMATION AND THE NEED TO KEEP THAT VERY  
4 CLASSIFIED INFORMATION WITHIN CONTROLLED PARAMETERS.  
5 OTHERWISE, WE'RE ALL AT A LOSS. AS AMERICANS, MR. WILKES AND  
6 YOU AND I ARE ALL AT A LOSS IF THAT GETS OUT. SO THAT'S THE  
7 CONCERN THAT'S BUFFETING ME.

8 MR. GERAGOS: LOOK, JUDGE, THIS HAS NOTHING TO DO  
9 WITH YOU. IT'S THE IDEA THAT SOMEHOW I'M STANDING IN A  
10 COURTROOM AND THEY'RE WORRIED -- THIS DEPARTMENT OF JUSTICE IS  
11 WORRIED ABOUT CLASSIFIED INFORMATION BEING LEAKED AS PRESIDENT  
12 BUSH IS PARDONING SCOOTER LIBBY FOR LEAKING CLASSIFIED  
13 INFORMATION IS LAUGHABLE. THIS WHOLE THING IS JUST LAUGHABLE.

14 I'M NOT, UNDER ANY CIRCUMSTANCES, GOING TO SUBMIT TO  
15 A CLASSIFICATION PROGRAM THAT THE WHITE HOUSE VIOLATES ON A  
16 DAILY BASIS. IT'S A JOKE. THEY USE THE CLASSIFICATION  
17 PROGRAM FOR POLITICAL PURPOSES, AND THEY DO IT WILLY-NILLY.  
18 AND THEY THUMB THEIR NOSE AT THE JUSTICE SYSTEM AND OTHER  
19 U.S DISTRICT COURT JUDGES AS THEY DID IN THIS MOST RECENT  
20 CASE.

21 THE COURT: YOU'RE MAKING A POLITICAL STATEMENT NOW,  
22 MR. GERAGOS.

23 MR. GERAGOS: IT IS A POLITICAL STATEMENT. THE  
24 POLITICAL STATEMENT INFORMS THE PRINCIPLE AND THE FACT THAT I  
25 AM A LAWYER. AND I DON'T BELIEVE THAT THE 6TH AMENDMENT OR

1 ANYTHING ABOUT THE CODES IN THIS STATE REQUIRES THAT I DO  
2 ANYTHING OTHER THAN STAY IN GOOD STANDING WITH THE STATE BAR  
3 AND THAT THE ONLY PERSON WHO CAN DETERMINE WHETHER I CAN --  
4 SUBJECT TO, OBVIOUSLY, GOOD BEHAVIOR IN FRONT OF THE COURT,  
5 THE ONLY PERSON THAT CAN DETERMINE THE BODY IS THE CALIFORNIA  
6 SUPREME COURT.

7 THE COURT: THIS REQUIREMENT IS NOT PECULIAR TO YOU.  
8 IT'S BEEN IN EFFECT LONG BEFORE PRESIDENT BUSH TOOK OFFICE.  
9 IT'S BEEN IN EFFECT THROUGH VARIOUS ADMINISTRATIONS,  
10 REPUBLICAN AND DEMOCRAT.

11 MR. GERAGOS: THE PROBLEM IS IS THAT THIS  
12 ADMINISTRATION HAS USED IT IN WAYS IT'S NEVER BEEN USED  
13 BEFORE.

14 THE COURT: IT'S NEUTRAL TO YOU, AND THE ASSURANCE  
15 OF ITS NEUTRALITY IS THAT I AND THE COURT SECURITY OFFICER ARE  
16 THE ONES MAKING THE DECISION. IT'S NEUTRAL TO MR. WILKES.  
17 IT'S NOT PECULIAR TO EITHER OF THEM. IT'S NOT SOMETHING THAT  
18 WE DEvised YESTERDAY TO IMPOSE ON YOU OR MAKE LIFE DIFFICULT  
19 FOR YOU OR MR. WILKES IN DEFENDING THIS CASE. THEY'RE  
20 LONGSTANDING. THE REGULATIONS WERE WRITTEN THREE CHIEF  
21 JUSTICES AGO.

22 MR. GERAGOS: I DON'T THINK IT'S PECULIAR TO ME. I  
23 CERTAINLY DON'T THINK IT'S ENDEMIC TO THIS PARTICULAR CASE OR  
24 ANYTHING ELSE. AS I SAID, I BELIEVE THAT NO DEFENSE LAWYER  
25 WHOSE CLIENT HASN'T GONE UNDER THE SCRUTINY OF A SECURITY

1 CLEARANCE HIMSELF HAS ANY BUSINESS GOING UNDER A SECURITY  
2 CLEARANCE SO THAT THE GOVERNMENT CAN GIVE HIM CLASSIFIED  
3 INFORMATION. I JUST DON'T BELIEVE THAT THAT'S SOMETHING THAT  
4 IS REQUIRED.

5 THE COURT: YOU'RE GOING TO HAVE A CHANCE TO TEST  
6 THE PROPOSITION. I'M WITH YOU IN SPIRIT. I DON'T LIKE IT,  
7 BUT I UNDERSTAND IT. I UNDERSTAND THE NEED FOR IT AND THE  
8 OVERLAY BECAUSE THE INFORMATION TRULY HERE IS CLASSIFIED.

9 LET ME SAY THIS: IF I THOUGHT FOR A SECOND THAT ANY  
10 OF THIS WAS PRETEXTUAL, THAT THERE WAS AN EFFORT TO  
11 OVER-CLASSIFY INFORMATION, THEN I WOULDN'T BE ONBOARD. THEN  
12 I'D GO THE OTHER WAY ON THIS.

13 BUT HAVING SEEN THE EXCERPT THAT I SAW, I'M  
14 ABSOLUTELY CONVINCED THAT THERE IS A NEED ON THE PART OF THE  
15 UNITED STATES TO PROTECT THIS INFORMATION. THAT NEED WAS  
16 SPOKEN OF BY MR. LONDERGAN, WHO IS ALSO FAMILIAR WITH THE  
17 INFORMATION. AND HE'S INSISTENT THAT PEOPLE HAVING ACCESS TO  
18 IT HAVE THIS CLEARANCE, NOT AS A REPRESENTATIVE OF THE  
19 PROSECUTORS OR ANY OTHER PARTIES. HE'S LOOKED AT IT. HE'S  
20 LOOKING AT IT AS SOMEONE WHO'S CONCERNED WITH CLASSIFIED  
21 INFORMATION AND KEEPING IT CLASSIFIED AND PROTECTING SECRETS  
22 THAT ARE IMPORTANT TO THE UNITED STATES.

23 THE COURT ALSO HAS THAT CONCERN HERE. I UNDERSTAND  
24 THE STRONG PRESUMPTION IN FAVOR OF MR. WILKES'S RIGHT TO HAVE  
25 HIS OWN COUNSEL. HOWEVER, I DON'T SEE ANY WORKABLE

1 ALTERNATIVE IF MR. GERAGOS IS UNWILLING TO GO THROUGH THE  
2 PROCEDURE EXCEPT TO FIND THAT HE HAS A CONFLICT.

3 AS I SAID, THE IDEA OF ME TRYING TO PARSE 17,000  
4 PAGES OF MATERIAL, HAVING ME TRY TO ACT AS DEFENSE COUNSEL FOR  
5 MR. WILKES AND DETERMINE EXACTLY WHAT'S EXCULPATORY AND WHAT'S  
6 IMPEACHMENT MATERIAL IS A POSITION THAT I DON'T WANT TO PUT  
7 MYSELF IN AND, AS THE TRIAL JUDGE IN THIS CASE, I SHOULDN'T BE  
8 IN. INSTEAD, I SHOULD BE IN A POSITION OF DECIDING BASED ON  
9 ARGUMENTS FROM THE PROSECUTORS ON THE ONE SIDE AND COUNSEL FOR  
10 MR. WILKES ON THE OTHER.

11 AND THE EFFECT OF YOU REFUSING TO GO THROUGH THIS,  
12 EVEN ON PRINCIPLE GROUNDS, IS I'M DENIED THAT. I DON'T HAVE  
13 THE OPPORTUNITY TO MAKE A RULING. INSTEAD, I HAVE TO SORT OF  
14 SHIFT INTO AN ADVERSARIAL GEAR AND MAKE THE ARGUMENTS FOR YOU.  
15 THAT'S AN INAPPROPRIATE POSITION FOR ME TO BE IN, AND I REFUSE  
16 TO BE IN IT.

17 RELUCTANTLY, MR. GERAGOS, I'M GOING TO ORDER THAT  
18 YOU ARE REMOVED FROM MR. WILKES'S CASE IN UNITED STATES VERSUS  
19 WILKES AND FOGGO. I'M RELUCTANT ABOUT THAT. TO THE EXTENT  
20 THAT THE GOVERNMENT IS WRONG, MR. HALPERN IS WRONG ABOUT A  
21 RIGHT TO A WRIT TO MANDAMUS, I ENCOURAGE YOU TO FILE THAT  
22 RIGHT AWAY AND SEE IF THREE SMARTER PEOPLE ON THE 9TH CIRCUIT  
23 COURT OF APPEALS MAY DISAGREE WITH ME ON THIS.

24 I THINK THE RECORD IS COMPLETE AS TO WHAT MY REASONS  
25 WERE, ALL THE CONSIDERATIONS THAT I MADE. BUT IT WON'T WORK

1 WITH YOU NOT HAVING ACCESS TO THIS AND THE ABILITY TO IDENTIFY  
2 WHAT IS EXCULPATORY, WHAT IS IMPEACHMENT. TO URGE ME ON WHAT  
3 THE PROPER MODIFICATIONS ARE, SANITIZING OF MATERIAL, I NEED  
4 THAT INPUT FROM SOMEBODY ON BEHALF OF THE DEFENDANTS.

5 SO MR. WILKES, I'M RELIEVING MR. GERAGOS ON THE  
6 FOGGO CASE, WHICH IS NOT SET UNTIL OCTOBER. I'M GOING TO SET  
7 A STATUS CONFERENCE.

8 TISH, DO YOU HAVE A DATE ROUGHLY TWO WEEKS OUT?

9 THE CLERK: JULY 23RD.

10 THE COURT: MR. WILKES, IS JULY 23RD A CONVENIENT  
11 DATE FOR YOU TO COME BACK AND INFORM ME OF NEW COUNSEL AND  
12 MAKE AN APPEARANCE WITH NEW COUNSEL ON THE FOGGO CASE?

13 MR. GERAGOS REMAINS, AS I SAID --

14 MR. GERAGOS: HE'S ALREADY TOLD ME, YOUR HONOR, THAT  
15 HE WANTS ONE COUNSEL TO REPRESENT HIM ON BOTH.

16 THE COURT: THAT MAY BE, BUT YOU'VE ENTERED A  
17 GENERAL APPEARANCE ON THAT CASE. I'VE SET A TRIAL DATE. SO  
18 MR. WILKES MAY NOT BE IN A POSITION TO DICTATE THAT.

19 DEFENDANT WILKES: THERE ARE COMPLICATED FINANCIAL  
20 REASONS FOR THAT. AND OVER THE LAST 23 MONTHS THROUGH LEAKS  
21 AND OTHER PROBLEMS THAT HAVE BEEN DEBATED IN THE PRESS, I'VE  
22 BEEN STRIPPED OF MY BUSINESS AND, THEREFORE, MY INCOME, MY  
23 REPUTATION AND, THEREFORE, MANY OF THE RELATIONSHIPS THAT I  
24 HAD TO HELP SUPPORT THIS, MY EMPLOYEE BASE, PEOPLE WITH  
25 INSTITUTIONAL MEMORY THAT COULD HELP DEVELOP THE DEFENSE

1 AGAINST WHAT I THINK ARE ABSURD ALLEGATIONS AGAINST ME.

2 SO THE FACT THAT NOW I'M BEING STRIPPED OF MY LAWYER  
3 IN THIS IS JUST THE NEXT AFFRONT. AND I DON'T EVEN KNOW HOW  
4 TO REACT TO IT. WE HAVE WORKED VERY HARD OVER THE LAST  
5 23 MONTHS, SOMETIMES WITH GOOD HELP AND SOMETIMES EARLY ON  
6 WITH SOME VERY BAD HELP. AND I'M AT A POINT NOW WHERE MY  
7 RESOURCES ARE STRETCHED BEYOND THE POINT OF BREAKING. I DON'T  
8 HAVE A WAY TO ACCOMPLISH HIRING ANOTHER LAWYER.

9 THE COURT: DO YOU BELIEVE, MR. GERAGOS, THAT HE  
10 MIGHT QUALIFY, GIVEN HIS CURRENT SITUATION, FOR APPOINTED  
11 COUNSEL?

12 MR. GERAGOS: NO.

13 THE COURT: WELL, MR. GERAGOS KNOWS WHAT THE  
14 STANDARDS ARE FOR ME TO APPOINT COUNSEL FOR YOU. WE HAVE A  
15 LOT OF QUALIFIED COUNSEL WHO COULD BE APPOINTED. BUT I'LL  
16 TAKE HIS WORD THAT YOU DON'T QUALIFY FOR THAT.

17 I UNDERSTAND EVERYTHING YOU'VE SAID, MR. WILKES. I  
18 DON'T MAKE THIS DECISION HAPPILY. I'M VERY RELUCTANT TO DO  
19 THIS.

20 MR. GERAGOS: COULD I ASK THAT THE COURT, INSTEAD OF  
21 THE JULY 23RD DATE, GIVE ME A DATE THE FIRST WEEK OF AUGUST SO  
22 THAT I'M DONE WITH MY PHILADELPHIA CASE? BECAUSE I'M GOING TO  
23 MAKE A FORMAL MOTION IN THE INTERIM, IF WE DECIDE NOT TO GO TO  
24 THE 9TH CIRCUIT, TO BE RELIEVED ON THE OTHER CASE FOR VARIOUS  
25 REASONS. AND I'LL PROBABLY FILE THAT EX PARTE AND UNDER

1 SEAL.

2 THE COURT: WELL --

3 MR. GERAGOS: THERE IS NO WAY FOR ME TO ARTICULATE  
4 IT WITHOUT BETRAYING ATTORNEY-CLIENT.

5 THE COURT: I'LL CERTAINLY PERMIT YOU TO DO THAT,  
6 MR. GERAGOS. I'M RELUCTANT TO PUT THIS OUT TOO FAR BECAUSE BY  
7 PUTTING IT OUT FAR, IT MIGHT FORCE THE VERY OUTCOME THAT I'M  
8 TRYING TO AVOID HERE.

9 MR. GERAGOS: I UNDERSTAND THAT, BUT I START NEXT  
10 MONDAY IN PHILADELPHIA IN FROM OF JUDGE KAUFMAN. HE'S ORDERED  
11 100 JURORS.

12 THE COURT: WHAT IF YOU MAKE YOUR SUBMISSION AND --  
13 YOU KNOW, WE'RE THREE HOURS BEHIND THEM -- MR. MAC DOUGALL  
14 HERE AND THE OTHERS ARE AVAILABLE BY PHONE? CAN YOU BE  
15 AVAILABLE BY PHONE?

16 MR. GERAGOS: SURE.

17 THE COURT: DO YOU EXPECT THAT YOU'LL STILL BE IN  
18 PHILADELPHIA ON JULY 23RD?

19 MR. GERAGOS: ABSOLUTELY. IT'S A THREE-WEEK  
20 ESTIMATE.

21 THE COURT: I'LL SET IT FOR 3:00, WHICH WILL BE  
22 6:00.

23 YOU'LL BE OUT OF COURT BY THEN?

24 MR. GERAGOS: YES, SIR.

25 THE COURT: MR. WILKES, I WANT YOU TO BE PERSONALLY

1 PRESENT WITH COUNSEL AT THAT TIME, JULY 23RD.

2 DON'T MISUNDERSTAND. I'VE HEARD WHAT YOU'VE SAID.  
3 I'M MINDFUL OF THAT. I'M SYMPATHETIC. MY URGING TO YOU AND  
4 MR. GERAGOS AT THIS POINT IS THAT YOU TAKE A WRIT OF MANDATE,  
5 YOU ASK FOR AN EMERGENCY PETITION IN FRONT OF THE COURT OF  
6 APPEALS TO RESTORE THE STATUS QUO. IF I'M WRONG ABOUT THIS,  
7 THEN THEY'LL TELL ME. BUT I HAVE MISGIVINGS. I DON'T THINK  
8 THERE'S ANY WAY PRACTICALLY THAT YOU CAN GO TO TRIAL WITHOUT  
9 KNOWING THIS INFORMATION.

10 I DON'T KNOW WHAT IS HELPFUL TO YOU IN YOUR DEFENSE,  
11 AND I'M NOT YOUR ADVOCATE. I DON'T WANT TO BE PUT IN A  
12 POSITION OF DOING THAT. MY JUDGMENT'S INFORMED WHEN I GET  
13 INFORMATION FROM BOTH SIDES. AND WITHOUT HAVING SOMEBODY WITH  
14 ACCESS TO THIS INFORMATION ON YOUR SIDE, I'M LOST.

15 SO I FEEL MY HAND IS FORCED HERE. I UNDERSTAND YOUR  
16 LAWYER'S PRINCIPLE POSITION. I UNDERSTAND IT COMPLETELY.

17 MR. GERAGOS, I'D ASK YOU TO RECONSIDER. IF YOU DO,  
18 YOU CAN LET ME KNOW. BUT OTHERWISE, JULY 23RD AT 3:00 FOR  
19 MR. WILKES TO COME IN WITH NEW COUNSEL ON THE WILKES/FOGGO  
20 CASE. MR. GERAGOS REMAINS COUNSEL OF RECORD ON  
21 WILKES-MICHAEL. THAT CASE IS GOING ON THE DATE ASSIGNED.

22 UNLESS I'M CONVINCED BY A VERY PERSUASIVE SHOWING,  
23 MR. GERAGOS, YOU'RE GOING TO BE HERE AND BE READY TO GO TO  
24 TRIAL ON THAT DATE IN SEPTEMBER.

25 ANYTHING ELSE, MR. MAC DOUGALL OR MR. GRANGER?



1 MR. TESLIK: THIS IS RANDY TESLIK, MR. MAC DOUGALL'S  
2 PARTNER.

3 WE HAVE ONE MATTER THAT'S SOMEWHAT RELATED TO THE  
4 COLLOQUY THAT THE COURT JUST HAD.

5 LAST WEEK, JULY 3RD, A MEMBER OF OUR TEAM MET WITH  
6 MR. MC PHERSON, WHO'S THE DEPUTY GENERAL COUNSEL OF THE CIA.  
7 YOUR HONOR, MOST OF US HAVE BEEN CLEARED AT THE TOP SECRET  
8 LEVEL, BUT THERE ARE ADDITIONAL CLEARANCES THAT ARE REQUIRED  
9 ABOVE THE TOP SECRET LEVEL FOR MUCH OF THE INFORMATION THAT WE  
10 BELIEVE IS RELEVANT IN THIS CASE. THOSE ARE CALLED  
11 COMPARTMENTS. AND IN ORDER FOR US TO BE CLEARED IN THE  
12 COMPARTMENTS, WE HAVE TO MAKE FURTHER REQUESTS TO THE CIA ONCE  
13 WE IDENTIFY A PARTICULAR COMPARTMENT AFTER EITHER REVIEWING  
14 DOCUMENTS OR CONSULTING WITH MR. FOGGO.

15 AND LAST WEEK, WE MADE SUCH A REQUEST FOR A  
16 PARTICULAR COMPARTMENT, AND WE WERE DENIED THAT REQUEST. THE  
17 CIA ASKED US TO MAKE A PROFFER OF WHY THAT PARTICULAR  
18 COMPARTMENT OR INFORMATION RELATING TO THAT COMPARTMENT WAS  
19 MATERIAL TO MR. FOGGO'S DEFENSE, WHICH WE WERE PREPARED TO DO  
20 ON THE CONDITION THAT THAT INFORMATION, OUR PROFFER,  
21 ESSENTIALLY, KIND OF THE ROADMAP TO OUR DEFENSE, NOT BEING  
22 DISCLOSED TO MEMBERS OF THE AGENCY WHO ARE WORKING WITH THE  
23 PROSECUTION TEAM OR THE PROSECUTION TEAM ITSELF.

24 THE CIA DENIED THAT REQUEST AND TOLD US THAT IF WE  
25 WERE TO MAKE SUCH A PROFFER, THAT THE CIA WOULD SHARE THAT

1 PROFFER WITH THE PROSECUTION TEAM. I THINK THAT THAT'S  
2 COMPLETELY CONTRARY TO MR. FOGGO'S RIGHT TO COUNSEL.

3 THE COURT: IT'S CONTRARY TO THE ORDER THAT I ISSUED  
4 EARLIER IN THIS CASE THAT THAT NOT HAPPEN.

5 MR. GERAGOS: THAT'S PRECISELY WHY I MADE MY  
6 OBJECTION. I THANK CO-COUNSEL FOR BRINGING THAT UP.

7 THE COURT: THERE'S RECOURSE. THE PROOF'S IN THE  
8 PUDDING HERE. THEY COME TO ME, AND I'M GOING TO TELL THEM  
9 THEY CAN'T DO THAT.

10 MR. GERAGOS: WHO ARE YOU GOING TO BELIEVE? YOU  
11 CAN'T ORDER THE CIA TO DO ANYTHING. I UNDERSTAND YOU CAN MAKE  
12 THE ORDER, BUT WHO'S GOING TO ENFORCE IT?

13 THE COURT: WE'LL SEE.

14 MR. HALPERN: IF I MIGHT, ALSO, MR. TESLIK DIDN'T  
15 BRING THAT UP TO THE GOVERNMENT YET. I CAN SEE WHY IT MIGHT  
16 HAVE BEEN SENSITIVE IN THAT HE DIDN'T. BUT ASSUMING THIS  
17 FALLS WITHIN YOUR HONOR'S TUHEY ORDER, THIS IS SOMETHING THAT  
18 WE MIGHT BE ABLE TO IRON OUT BECAUSE I DON'T REALLY THINK IT  
19 IS A PROBLEM.

20 THE COURT: MR. TESLIK, HER'S WHAT I'M GOING TO DO:  
21 I'LL ALLOW MR. HALPERN AND MR. FORGE TO CALL BACK THERE AND  
22 REMIND THE CIA OFFICIALS THAT I'VE ENTERED AN ORDER THAT  
23 ANYTIME YOU MAKE A PROFFER, THAT THAT INFORMATION IS TO BE  
24 KEPT CONFIDENTIAL AND NOT TO BE GIVEN OVER TO ANY MEMBER OF  
25 THE PROSECUTION TEAM OR ANY COMPONENT OF THE UNITED STATES

1 JUSTICE DEPARTMENT OR U.S. ATTORNEY'S OFFICE.

2 I DID ORDER THAT, MR. HALPERN, AT THE EARLIER  
3 OCCASION WHEN THIS CAME UP. I DON'T THINK IN ORDER TO GET  
4 INFORMATION THAT'S RELEVANT, THAT THEY NEED TO TELL YOU WHAT  
5 THE REASON IS THAT THEY THINK IT'S RELEVANT. I DON'T THINK  
6 YOU WANT THAT.

7 MR. HALPERN: AGAIN, YOUR HONOR, NOT WHEN IT FALLS  
8 WITHIN THE COURT'S LAST TUHEY RULING. IF THIS IS SOMETHING  
9 BROADER REQUIRING THEM TO GET INFORMATION THAT IS NOT RELEVANT  
10 TO THE CASE THAT IS CLASSIFIED, THAT IS SOMETHING THAT THE  
11 COURT WOULD HAVE TO INVOLVE ITSELF WITH. MY UNDERSTANDING IS  
12 THEY HAVE ALL THE CLEARANCES THAT WE HAVE. SO THEY HAVE  
13 ACCESS TO ALL --

14 THE COURT: HE'S TELLING ME THAT THERE'S A LEVEL OR  
15 A COMPARTMENT HIGHER THAN TOP SECRET AND THAT THIS IMPLICATES  
16 THAT. BUT THE POINT I MADE WAS THAT YOU'RE NOT ENTITLED TO  
17 KNOW WHY THEY THINK CERTAIN INFORMATION MAY BE RELEVANT. I  
18 SAID THAT THEY WOULD MAKE THEIR PROFFER TO THE CIA, AND THE  
19 CIA WOULD EVALUATE THAT AND ACT ON THAT. AND THEY HAVE  
20 RECOURSE TO COME BACK TO ME IF THEY THINK THAT IT'S BEEN  
21 WRONGLY DENIED. BUT THE PROSECUTORS HERE OUGHT NOT TO BE IN  
22 THAT EQUATION.

23 MR. HALPERN: YOUR HONOR, I UNDERSTAND. AS I SAID,  
24 BECAUSE I HAVEN'T BEEN INVOLVED IN THIS AT ALL, I'M SOMEWHAT  
25 AT A LOSS. HOWEVER, JOHN MC PHERSON, WHO IS WITH THE GENERAL

1 COUNSEL'S OFFICE OF THE CIA, IS HERE. HE MIGHT BE ABLE TO  
2 SHED SOME LIGHT ON IT.

3 THE COURT: MR. MC PHERSON, I'M HAPPY TO HEAR FROM  
4 YOU. IF YOU RECALL IT DIFFERENTLY -- I THINK I WAS FAIRLY  
5 CLEAR.

6 MR. MC PHERSON: NO. YOU RECALL IT CORRECTLY.

7 GOOD AFTERNOON. JOHN MC PHERSON FROM GENERAL  
8 COUNSEL'S OFFICE, CIA.

9 I DID MEET WITH MR. MAC DOUGALL AND MR. BUTLER LAST  
10 WEEK IN CONNECTION WITH THEIR REQUEST FOR ONE SPECIFIC PROGRAM  
11 THEY MENTIONED, AND THEY CONTEMPLATED OTHERS WHICH THEY DID  
12 NOT SPECIFY. THEY GAVE ME A RATHER -- I WOULD SAY AN OBLIQUE  
13 REFERENCE TO WHY THEY THOUGHT IT WOULD BE RELEVANT TO LEARN  
14 THAT INFORMATION. THE REPRESENTATION I MADE, I SAID I WAS NOT  
15 SATISFIED. I WOULD RECOMMEND TO HOMELAND SECURITY OFFICIALS  
16 THAT THEY NOT GRANT ACCESS ON THAT BASIS BECAUSE IT DID NOT  
17 APPEAR RELEVANT TO THE CASE.

18 I SAID THE PROSECUTION MAY HAVE A DIFFERENT VIEW,  
19 BUT I'M MINDFUL OF THE PROTECTIVE ORDER. WE'RE TO HAVE NO  
20 CONVERSATIONS WITH THEM. MR. MAC DOUGALL OFFERED TO MAKE A  
21 MORE EXTENSIVE PROFFER WITH THE UNDERSTANDING, THEN, THAT WE  
22 STILL WOULD MAKE NO COMMUNICATIONS WITH THE GOVERNMENT.

23 ON THAT BASIS, WE HAVE DISCUSSED, ALTHOUGH I'M STILL  
24 NOT SATISFIED FOR THE BASIS OF WHAT WAS THEIR RECOURSE, AND  
25 THEY TALKED ABOUT APPROACHING THE BENCH EX PARTE. I WAS

1 CONCERNED AT THAT POINT ABOUT WE HAD BEEN HANDICAPPED. THE  
2 UNITED STATES IS THE REPRESENTATIVE OF THE CIA. I WAS NOT  
3 WILLING TO HEAR A MORE EXTENSIVE PROFFER FROM THEM ON THAT  
4 BASIS.

5 SO MY PRELIMINARY ANSWER WAS "NO, I'M NOT WILLING TO  
6 HANDICAP OUR OWN REPRESENTATION IN THAT REGARD. I WILL DENY  
7 THAT REQUEST BECAUSE IT'S NOT APPARENT TO ME ON ITS FACE."

8 THE COURT: HERE'S HOW I WANT TO DEAL WITH THAT: I  
9 WANT YOU TO RECONSIDER. AND IF YOU NEED MORE DETAILS FROM  
10 THEM, THEN TELL THEM WHERE YOU THINK IT'S DEFICIENT AND WHERE  
11 YOU THINK THEY NEED MORE DETAILS.

12 IN NO EVENT IS ANY INFORMATION PROFFERED TO YOU TO  
13 BE TURNED OVER TO THE PROSECUTORS OR DISCLOSED TO THE  
14 PROSECUTORS IN THIS CASE OR THE DEPARTMENT OF JUSTICE. IF A  
15 DISPUTE PERSISTS AFTER THEY MAKE A MORE DETAILED PROFFER, THEN  
16 WE'LL ARRANGE FOR AN EX PARTE HEARING WHERE YOU CAN BE PRESENT  
17 AS THE CIA REPRESENTATIVE, AND I'LL HEAR FROM THEM. WE CAN DO  
18 THIS TELEPHONICALLY. I'LL MAKE A JUDGMENT ABOUT WHETHER THE  
19 AGENCY SHOULD GIVE IT OVER OR NOT.

20 IF PART OF THAT IS THAT YOU HAVE TO MEET WITH ME  
21 EX PARTE TO GO OVER THIS BEFORE YOU DISCLOSE IT, THEN I WILL  
22 BE HAPPY TO DO THAT. BUT WE'VE GOT TO KEEP THE PROSECUTORS  
23 OUT OF THE LOOP. THIS TURNS THE JUSTICE SYSTEM AND THE  
24 ADVERSARIAL SYSTEM ON ITS HEAD IF THEY KNOW WHAT'S BEING  
25 PROFFERED AS MATERIAL BY THE DEFENSE. THEY DON'T GET TO KNOW

1 THAT.

2 SO I'M SENSITIVE TO THE NATURE OF THE INFORMATION.  
3 IF YOU THINK THERE'S THINGS I NEED TO KNOW ABOUT THIS BEFORE I  
4 MAKE A RULING ON THIS, I'LL BE HAPPY ON A RECORD, A SEALED  
5 RECORD, TO MEET WITH YOU AND TO GET YOUR PERSPECTIVE ON THAT.  
6 MY INCLINATION IS THAT IT OUGHT TO GO FORWARD FIRST WITH THEM  
7 GIVING YOU A LITTLE MORE DETAIL AND HAVING YOU RECONSIDER IT.  
8 AS I SAID, IF A DISPUTE PERSISTS, THEN YOU AS A REPRESENTATIVE  
9 OF THE CIA AND THEY AS MR. FOGGO'S REPRESENTATIVE CAN COME  
10 BACK TO ME.

11 IS THAT AGREEABLE?

12 MR. MC PHERSON: THE PROBLEM WITH THAT, YOUR HONOR,  
13 IS I'M NOT TRIAL COUNSEL. ONLY FAMILIAR TRIAL COUNSEL WOULD  
14 BE ABLE TO EXPLAIN TO THE COURT WHY THE DEFENSE PROFFER DOES  
15 NOT RELATE TO THE CHARGES OR ARE NOT A LEGITIMATE DEFENSE.

16 THE COURT: I UNDERSTAND. I THINK I AM. I THINK I  
17 HAVE ENOUGH BACKGROUND AT THIS POINT THAT I CAN UNDERSTAND  
18 WHETHER THIS IS RELEVANT AND WHETHER THEY OUGHT TO HAVE ACCESS  
19 TO IT. THE THING THAT YOU SUGGEST IS THAT WE CLUE THE  
20 GOVERNMENT IN ON WHY THEY THINK IT'S RELEVANT. THAT'S NOT  
21 GOING TO WORK.

22 MR. MC PHERSON: I JUST WANT TO BE CLEAR, THIS IS  
23 NOT IN THE CONTEXT OF A DISCOVERY REQUEST. THIS IS FOR A  
24 TUHEY REQUEST FOR VOLUNTARY INTERVIEWS OF WITNESSES. SO THESE  
25 WITNESSES ARE INFORMED BY THE CIA WHAT CLASSIFIED INFORMATION

1       THEY'RE AUTHORIZED TO DISCLOSE TO THIRD PARTIES.

2               MR. TESLIK:   THIS IS RANDY TESLIK.

3               I THINK THAT THE COMPARTMENT THAT WE'VE ASKED TO BE  
4       READ INTO IS NECESSARY FOR MORE THAN THE TUHEY PURPOSES; THAT  
5       IS, THE PURPOSES OF INTERVIEWING WITNESSES.   IT INVOLVES  
6       POTENTIAL DOCUMENTS THAT WE'LL BE SEEKING.   WE'VE ALREADY  
7       SOUGHT SUCH DOCUMENTS THAT WE BELIEVE ARE RELEVANT TO CERTAIN  
8       OF THESE COMPARTMENTS.

9               OUR CLIENT WAS, BY VIRTUE OF HIS POSITION, CLEARED  
10       INTO NUMEROUS COMPARTMENTS.   SO I JUST WANT TO MAKE SURE THAT  
11       THE COURT AND MR. MC PHERSON UNDERSTAND THAT WHILE WE  
12       REQUESTED ONE SUCH COMPARTMENT LAST WEEK, THERE ARE GOING TO  
13       BE NUMEROUS OTHER COMPARTMENTS THAT WE'RE GOING TO  
14       SPECIFICALLY ASK TO BE READ INTO FOR GENERAL PURPOSES IN THIS  
15       CASE, NOT JUST FOR TUHEY PURPOSES.

16              THE COURT:   MR. FORGE, DO YOU HAVE ANY POSITION ON  
17       THIS?

18              MR. FORGE:   NO.   WE'RE NOT INFORMED OF IT.   I WOULD  
19       SIMPLY SAY REGARDING MR. TESLIK'S REFERENCE TO DOCUMENTS  
20       THEY'RE GOING TO BE REQUESTING, OBVIOUSLY THEIR ONLY RIGHTS  
21       TO, QUOTE/UNQUOTE, "REQUEST DOCUMENTS" WOULD BE THROUGH A  
22       COURT-ORDERED SUBPOENA THAT THEY WOULD HAVE TO APPLY FOR  
23       THROUGH THE COURT.   AND THAT, OBVIOUSLY, IS SUBJECT TO A  
24       POSSIBLE MOTION TO QUASH FROM THE GOVERNMENT.

25              BUT IN TERMS OF THIS ISSUE, WE DON'T HAVE ANY

1 INFORMATION. AND WE DON'T WANT IT. ALTHOUGH OBVIOUSLY, YOUR  
2 HONOR, IF YOUR HONOR FEELS THAT IT WOULD BE HELPFUL TO HAVE  
3 SOMEBODY FROM THE PROSECUTION SIDE, WE COULD IN OUR OFFICE  
4 ARRANGE TO HAVE A TEAM BECOME FAMILIARIZED WITH THE FACTS OF  
5 THE CASE AND BE FAMILIARIZED ENOUGH TO AT LEAST SERVE AS  
6 ADVOCATES, BUT BE WALLED OFF FROM THE PROSECUTION TEAM.

7 THE COURT: I DON'T THINK I'M GOING TO DO THAT AT  
8 THIS POINT.

9 MR. TESLIK, I AGREE WITH THE DISTINCTION THAT  
10 MR. FORGE HAS MADE. THE PRODUCTION OF CLASSIFIED DOCUMENTS IS  
11 TO PROCEED THROUGH THE CLASSIFIED INFORMATION PROTECTION ACT.  
12 SO THAT'S WHERE YOU MAKE YOUR APPLICATION. COME BACK TO ME IF  
13 THERE'S A DISPUTE ABOUT THAT.

14 WITH REGARD TO INTERVIEWING WITNESSES, I'M GOING TO  
15 ADHERE TO WHAT I SUGGESTED TO MR. MC PHERSON AT THE BEGINNING.  
16 I WANT YOU TO MAKE A MORE DETAILED PROFFER, TRY TO CONVINCE  
17 HIM WHY YOU THINK IT'S MATERIAL THAT YOU HAVE ACCESS TO THESE  
18 WITNESSES. IF THE DISPUTE PERSISTS, THEN CALL AND LET ME  
19 KNOW, MR. TESLIK, AND I'LL ARRANGE AN EX PARTE ON THE RECORD,  
20 BUT AN IN CAMERA HEARING TO HEAR THE DISPUTE AND TO MAKE SUCH  
21 DECISIONS AS I'M ABLE TO MAKE.

22 MR. MC PHERSON, AS I SAID, IF YOU THINK THAT AS PART  
23 OF THAT I NEED TO SPEAK PERSONALLY AND PRIVATELY WITH YOU, YOU  
24 HAVE REASONS WHY YOU CAN'T DISCLOSE IT, THAT YOU CAN'T EVEN  
25 TELL THEM, THEN I CONTEMPLATE THAT THAT WOULD BE PART OF THE



1 PROCEDURE AS WELL. I'M VERY, VERY MINDFUL ABOUT THE SENSITIVE  
2 NATURE OF THIS INFORMATION. I'M NOT INCLINED TO GIVE IT OVER  
3 TO ANYBODY IF IT IMPERILS THE SAFETY OF THE UNITED STATES.  
4 THAT'S THE WAY WE'RE GOING TO GO WITH THAT.

5 ANYTHING ELSE, MR. TESLIK?

6 MR. TESLIK: NOT AT THIS TIME, YOUR HONOR.

7 MR. MC PHERSON: I JUST WANT TO MAKE CLEAR FOR THE  
8 RECORD WE INTERPOSE NO OBJECTION TO PRE-TRIAL REVIEWS OF  
9 WITNESSES. THIS IS ONLY ONE OF THE BOUNDS OF THE WITNESSES'  
10 TESTIMONY AS IT RELATES TO CERTAIN COMPARTMENT PROGRAMS.

11 SECOND, I'VE HAD NO COMMUNICATIONS WITH THE  
12 PROSECUTION OFFICE.

13 THE COURT: I KNEW THAT. I KNEW YOU WOULD COMPLY  
14 WITH THAT.

15 MR. GRANGER, ANYTHING MORE?

16 MR. GRANGER: ONE MATTER, JUDGE, THAT ACTUALLY  
17 RELATES TO WILKES/MICHAEL RATHER THAN FOGGO/WILKES.

18 IT'S A MINOR MATTER, IF I MAY.

19 THE COURT: OKAY.

20 MR. GRANGER: JUDGE, YOU HAVE SET A DEADLINE FOR  
21 NEXT MONDAY FOR MYSELF AND COUNSEL FOR MR. WILKES REGARDING  
22 POSSIBLE JURY QUESTIONS RELATED TO PUBLICITY.

23 IN LIGHT OF THE FACT THAT WE'RE DEALING NOW WITH  
24 POSSIBLE INTERVENTION IN THE GOVERNMENT'S INTERLOCUTORY APPEAL  
25 IN THE 9TH CIRCUIT, COULD WE PUSH THAT BACK A WEEK?

1 THE COURT: ANOTHER WEEK BEFORE YOU SUBMIT YOUR  
2 QUESTIONNAIRES?

3 MR. GRANGER: YES.

4 THE COURT: SURE. THIS IS ON THE WILKES/MICHAEL  
5 CASE. YOU HAVE ANOTHER WEEK FOR THAT.

6 MR. GERAGOS: I THOUGHT THE DEADLINE WAS THE 14TH.

7 MR. HALPERN: THE 16TH.

8 THE COURT: SO YOU WANT A WEEK BEYOND THE 16TH? IS  
9 THAT WHAT YOU'RE ASKING FOR, MR. GRANGER?

10 MR. GRANGER: IF I MAY, YOUR HONOR, YES.

11 THE COURT: HOW ABOUT THE 23RD? THAT'S THE DATE FOR  
12 OTHER PROCEEDINGS IN THIS CASE.

13 MR. MAC DOUGALL: MARK MAC DOUGALL.

14 I'D REQUEST TO BE INCLUDED IN THAT.

15 THE COURT: SURE. THE REQUEST WILL APPLY TO THE  
16 WILKES/FOGGO CASE AS WELL.

17 AS A PRACTICAL MATTER, IF NOTHING HAPPENS AND THIS  
18 ORDER TAKES EFFECT, THEN I'M GOING TO HAVE TO EXTEND THAT DATE  
19 ANYWAY BECAUSE NEW COUNSEL IS GOING TO HAVE TO COME IN AND BE  
20 READY TO PROMULGATE QUESTIONS IN A QUESTIONNAIRE AND GET THEM  
21 TO ME.

22 ANYTHING ELSE?

23 MR. GERAGOS: NOTHING FOR MR. WILKES, YOUR HONOR.

24 MR. HALPERN: YOUR HONOR, I HAVE NO DESIRE TO MAKE  
25 THESE PROCEEDINGS ANY LONGER THAN THEY ARE, BUT I DO THINK WE

1 NEED TO DISCUSS, AT LEAST TO GET SOME KIND OF PRELIMINARY  
2 SCHEDULE IF WE WANT TO TRY TO MAKE THIS TRIAL DATE, WHAT WOULD  
3 BE AN APPROPRIATE CIPA SECTION 5, CIPA SECTION 6(A), 6(C)  
4 SCHEDULE. THE FIRST HURDLE IS A SECTION 5 --

5 THE COURT: LOOK, I UNDERSTAND ALL THAT. I THINK  
6 IT'S PREMATURE IN LIGHT OF THE RULING THAT I MADE TODAY. I  
7 DON'T HAVE DELUSIONS. AS MUCH AS I LIKE TO TRY TO HOLD TRIAL  
8 DATES, I DON'T HAVE ILLUSIONS THAT NEW COUNSEL COMING IN ON  
9 THE 23RD IS GOING TO BE PREPARED IN OCTOBER FOR THE  
10 WILKES/FOGGO CASE. YOU'VE TOLD ME 17,000 PAGES. SO IT RUNS  
11 AGAINST MY GRAIN, BUT I MAY HAVE TO POSTPONE THAT CASE. AND  
12 I'LL GET TO THAT ON THE 23RD WHEN WE DECIDE.

13 BESIDES, MAYBE MR. GERAGOS WILL HAVE A CHANGE OF  
14 HEART AND CALL ME AND SAY, "JUDGE, GO AHEAD. CHECK ME OUT.  
15 YOU'RE NOT GOING TO FIND ANYTHING. I'M STAYING ON THESE  
16 CASES." I HOPE THAT HAPPENS.

17 MR. GERAGOS: AND I HOPE THE COURT HAS A CHANGE OF  
18 HEART AND SAYS, "YOU KNOW WHAT, MR. GERAGOS, I'D LIKE TO GET  
19 TO THE BOTTOM OF WHO LEAKED THIS INFORMATION OUT OF THE GRAND  
20 JURY."

21 THE COURT: THANK YOU VERY MUCH.

22 --000--  
23  
24  
25

1  
2  
3 I HEREBY CERTIFY THAT THE TESTIMONY  
4 ADDUCED IN THE FOREGOING MATTER IS  
5 A TRUE RECORD OF SAID PROCEEDINGS.  
6

7 S/EVA OEMICK

7-30-07

8 EVA OEMICK  
9 OFFICIAL COURT REPORTER

DATE